

# NAVAL POSTGRADUATE SCHOOL

## Monterey, California



## THESIS

### **POST-CONFLICT JUSTICE: ISSUES AND APPROACHES**

by

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June 2003

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**POST-CONFLICT JUSTICE: ISSUES AND APPROACHES**

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## **ABSTRACT**

In July 2002, the International Criminal Court (ICC) began operations as the primary international institution for the prosecution of war crimes, crimes against humanity and genocide or international crimes. During the 1990s, the United Nations Security Council authorized international war crimes tribunals for conflicts in the Balkans and in Rwanda. Despite the important developments that these institutions made in international criminal law, these courts have not contributed to the long-term capacity of post-conflict states to operate under the rule of law. In the late 1990s the United Nations started to use new types of hybrid tribunals designed to prosecute international crimes in post-conflict states that combined the power and expertise of the international community with the indigenous law and legal community. This thesis will use case studies to make a detailed evaluation of the institutions and the options facing the individual states and the international community when designing policies or authorizing a tribunal to try international crimes in a post-conflict environment.

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# **I. POST-CONFLICT JUSTICE**

## **A. INTRODUCTION**

### **1. Overview**

In 1945, the Allied Powers prosecuted individuals at tribunals held in Nuremberg and Tokyo for violations of international humanitarian law committed during World War II. These prosecutions marked a departure in international law for two reasons. First, it was the first time that individuals instead of nations had been successfully held accountable for their actions by the international community. Second, it was the first time that the international community had supplanted sovereign nations in the capacity of prosecuting citizens for criminal acts. In the 1990s, after a gap of over forty years caused by the Cold War, the United Nations again took an active role in post-conflict justice through the establishment of international criminal tribunals (ICTs) for the former Yugoslavia and Rwanda.

In July 2002, pursuant to the Rome Treaty of 1998, sixty members of the international community established the International Criminal Court (ICC) the main purpose of which is to prosecute war crimes, crimes against humanity, genocide and crimes of aggression. The ICC and ICTs have become two of the primary fora for post conflict justice. These mechanisms were designed to take the place of national courts in the prosecution of the most egregious crimes resulting from internal or international armed conflicts.

National courts in post-conflict environments often suffer from serious defects ranging from lack of political will and judicial independence to lack of capacity to prosecute complex criminal cases. Moreover, many states have been forced to give war criminals amnesty for their crimes as a price for peace. Due to these deficiencies, many violations of international humanitarian law go unpunished and guilty individuals carry on their activities with impunity. Thus, international tribunals have been seen as the key way to prosecute violations of international humanitarian law when national courts are either unwilling or unable to do so.

At the end of the 20<sup>th</sup> Century, other post-conflict judicial fora were developed that bridge the gap between international fora and their domestic counterparts. In 2000,

the international community agreed with the Government of Sierra Leone (GOSL) to establish a mixed tribunal to prosecute individuals for violations of international humanitarian law during the Sierra Leone Civil War (1991-2002). As the term “mixed” suggests, the Special Court for Sierra Leone differs from ICTs and the ICC in that it was established not by the United Nations or by international treaty, but by an agreement between the GOSL and the UN. Therefore, the Special Court is a hybrid institution that has both national and international characteristics. Sierra Leone is not alone in establishing a mixed tribunal. Another type of mixed court is currently operating in East Timor where the United Nations is assisting the local government in rebuild the judicial system.

This thesis will examine various approaches to post-conflict justice. The strengths and weakness of all the approaches will be examined in order to determine the effectiveness of post-conflict judicial institutions in terms of the transfer of international legal norms, capacity building and the development of international law. This effectiveness often depends on the institution itself, but support from the international community and post-conflict state is also essential.

## **2. Background**

The newly established ICC will operate under the principle of complementarity. Complementarity essentially means that the ICC will only assert jurisdiction pursuant to an order from the United Nations Security Council, or in those cases where a nation cannot or will not prosecute individuals for serious violations of international humanitarian law. Therefore primary jurisdiction for post-conflict justice issues will typically remain at the state level. Unfortunately, many states recovering from international or internal armed conflict do not have the capacity to prosecute individuals for international crimes. Thus, in situations where the state has low judicial capacity, the ICC will assume cases even when a state has the political will to prosecute individuals.<sup>1</sup> Even then, the ICC will prosecute only the most serious violations of international humanitarian law leaving the bulk of accused perpetrators to the national courts. Unfortunately, national courts lacking capacity, and sometimes political will, may have

---

<sup>1</sup> The ICC will not have jurisdiction over international crimes that occurred prior to July 2002 in some current international and internal armed conflicts, involving countries such as Iraq, the Democratic Republic of the Congo, and Colombia, but the international community will most likely have an interest in seeing justice take place for violations of international humanitarian law in those areas.



little choice but to not prosecute (impunity) or grant amnesty in conjunction with some form of truth and reconciliation commission.

The problem is that while purely international justice institutions ensure that individuals most responsible for massive violations of international humanitarian law are prosecuted, there is typically no complementary international effort at the state level to develop the capacity to prosecute lower level figures or to include state authorities in the prosecution of cases that should fall within their jurisdiction. Additionally, since the international tribunals normally hold their proceedings outside the state where the crimes occurred, the proceedings are not visible to the public and do not directly support reconciliation efforts. Mixed tribunals such as those in Sierra Leone and East Timor seek to address this problem. By examining these various international approaches to post-conflict justice, this thesis evaluates the extent to which each has succeeded not only in bringing criminals to justice, but also to building local capacity and extending international law in the process.

### **3. Research Question**

In order to analyze approaches to post-conflict justice in states with low capacity, the concept of post-conflict justice must be defined and explained. Post-conflict justice needs to be distinguished from both transitional justice, as when a state democratizes after a period of authoritarianism, and ordinary justice, which takes place in the normal functioning of the state. While most states have some form of functioning legal system, in many post-conflict cases these legal systems have been compromised by the former regime and/or left in shambles by war. Consequently, the international community is often urged to establish international tribunals to prosecute serious international crimes. With the establishment of the ICC, the international community will have a standing institution that will assume jurisdiction over international crimes when states will not or cannot prosecute.

In post-conflict environments, justice institutions are essential to establish accountability and reconciliation. However, questions must be asked about the long-term impact of the post-conflict justice institution after the international community has moved on to the next post-conflict situation. Have international prosecutions helped the justice and reconciliation process? Is the domestic perception favorable or unfavorable? Have

the international prosecutions left the state with the capacity to investigate and prosecute lower level figures responsible for international crimes? In short, post-conflict justice institutions must be examined to reveal their long-term impact on the societies they profess to assist.

This thesis explores three international approaches to post-conflict justice. First, it considers the unilateral approach, where international institutions act on the international level alone. Then it turns to situations where international and national post-conflict justice institutions operate side by side, but independently of one another. Finally the thesis studies mixed tribunals, which have adopted a coordinated international/national approach, to determine if they effectively incorporate the strengths and negate the weaknesses of the purely international approaches. Based on its findings, the thesis will outline for an approach to post-conflict justice that capitalizes on using international assistance to develop post-conflict justice institutions that prosecute war criminals, preserve sovereignty, enhance legitimacy and build national judicial capacity that will help strengthen the rule of law in post-conflict environments.

#### **4. Theory and Methodology**

This thesis will utilize a constructivist perspective that assumes that the liberal developments in international criminal justice are positive steps for democracy, human rights and the rule of law. The thesis will use the comparative case studies to begin to develop a theory of post-conflict justice. The primary research questions will be addressed in three stages. First, the basic concepts and issues of post-conflict justice will be examined. The historical legacy of the Nuremberg trials will be detailed to show why international justice and post-conflict judicial institutions are positive steps forward for the international system. This stage will also present an overview of the issues related to post-conflict justice such as the development of international law and its impact on sovereignty and state relations.

Second, case studies of differing types of institutional approaches will be analyzed to discover their effectiveness. The first case studies examine unilateral cases where the post-conflict justice is addressed at one level only. The case studies for the pure international examples will utilize the ICTY and the ICC. These cases have been selected since the focus of these institutions has been (and in the case of the ICC, will be)

the enforcement of international justice without necessarily working with or building parallel institutions or capabilities on the state level. The next case study explores a case where efforts at both the international and the national levels to address international crimes have been fragmented, with little coordination between the entities. The final set of case studies looks at integrated approaches where the international and national communities are working closely to build post-conflict judicial institutions that can be used to prosecute international crimes and build the capacity of the state to adhere to international norms.

## **5. Chapter-by-Chapter Summary**

Chapter I: This chapter will begin with a brief introduction including the background, research question and methodology. This introduction will flow into a discussion on the major issues concerning post-conflict justice. First, post-conflict justice will be defined. Then the thesis will explain why the international community demands that post-conflict justice mechanisms are put into place as well as the underlying legal basis for the establishment of the courts and international crimes. The thesis also describes the challenges of holding those guilty of international crimes accountable for their actions. Understanding these issues is critical for an appreciation of the tensions that exist between those who advocate for a more active international role in post-conflict justice and those who believe that the state should have more of a voice in the process.

Chapter II: This chapter examines unilateral international approaches such as the ICTY, which has been important to the development of international post-conflict justice over the past decade. The effectiveness of this approach will be scrutinized, because ICTs may be used again for conflicts that predate the operative date of the ICC. Then the ICC is examined to see how this court is set up to operate. Due to the recent founding of the court, evidence from specific cases cannot be examined, however, the structure of the court should be able to tell us how the rights of states may be affected. This chapter also considers “universal jurisdiction.” Universal jurisdiction is a legal principle that holds that certain crimes are so heinous that by their nature, any state has the jurisdiction to open proceedings against an accused even if the accused or the crime in question have no relation to the state that is bringing the action.

Chapter III: The institutions examined here are multilevel in the sense that prosecutions are taking place at the international and national levels. In the first case, Rwanda, the ICTR has been operating parallel to the national courts and an institution known as gacaca, which is a traditional conflict resolution system that has been modified to help process the overwhelming number of genocide cases. This chapter will also consider several types of mixed or hybrid tribunals. These tribunals result from agreements between sovereign states and the international community to develop post-conflict justice institutions together. The case study on East Timor demonstrates the benefits of having the international and state authorities working together, but also points out the practical difficulties encountered by an institution that is starved for resources and has a limited jurisdictional reach across international boundaries. The final case, Sierra Leone, demonstrates the potential for hybrid courts when the state and the international community focus their efforts on making such an institution work.

Chapter IV: The final chapter will serve as a comparative analysis of the various approaches. First the pure cases will be compared with the unintegrated. A tentative conclusion is that post-conflict justice on both levels is desirable. Following that assessment, the benefits of those approaches will be compared with the integrated approaches. The goal here is to determine under what conditions the various approaches can or should be pursued by states and the international community. In addition to conclusions and recommendations, this chapter will also reiterate the need to incorporate post-conflict justice institutions into the overall framework of post-conflict reconstruction.

## **B. POST-CONFLICT JUSTICE**

### **1. Conflict, Justice and Accountability**

Despite the growth of legal constraints on the use of armed force, many conflicts are still marred by criminal conduct ranging from common looting to atrocities such as the massacre of civilians. Thus, one of the most important areas for a state recovering from international or internal armed conflict to address is post-conflict justice and accountability. The existence of post-conflict justice mechanisms is a positive step forward for international human rights and the rule of law. By developing and imposing international judicial standards and insisting on the punishment of international crimes,

the international community has sent a message that states, governments, rebel groups and their leaders cannot indiscriminately and systematically violate international humanitarian law and human rights law during international and internal armed conflicts. Post-conflict justice as discussed in this thesis will include the issues surrounding the prosecution of a relatively small number of individuals in some post-conflict cases to the processing of more than 100,000 perpetrators for genocide related crimes in Rwanda.

The post-conflict judicial and related reconciliation processes are key components of the overall post-conflict reconstruction of society but they typically have implications that extend beyond the national borders. While these processes are obviously important to states recovering from war, in the past decade the international community has asserted its own renewed interest in punishing those individuals who are responsible for international crimes. This trend of punishing or holding those most responsible for war crimes, crimes against humanity, genocide and crimes of aggression (hereinafter – international crimes) accountable brings together several trends that have been developing for at least a century. However, it has only been in the past ten years that the forms of international criminal justice have really started to take shape.

The three trends that have combined to shape post-conflict justice are institutionalism, international legalism and post-conflict reconstruction. The confluence of these trends has come about, in part, from an increased awareness and concern for the human rights of individuals. Institutionalism in this context means the development of international judicial organizations such as the International Military Tribunal at Nuremberg, the International Court of Justice (ICJ) in the Hague, the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), the ICTs for Yugoslavia and Rwanda (ICTY and ICTR) and the ICC.

The historic development of international criminal justice institutions has been an important step in addressing human rights abuses by governments and other groups that operate in conflict environments. The human rights movement has been able to use the recent developments to influence the way nations interact internationally, regionally and bilaterally. Through the use of the ICTs and universal jurisdiction, statesmen, activists and jurists have been able to shape the way that governments and the international community interact with post-conflict regimes. These actors have narrowed the available

options of states and the international community to grant immunities and amnesties to criminals who have hitherto been able to hide behind official immunities or threats to disrupt fragile peace processes. Still these international efforts for redressing international crimes have met some resistance from states that perceive an independent and active international criminal justice system as an uncontrollable political tool and a threat to national sovereignty.

Developments in international criminal justice and the institutions that have resulted are a victory for liberal institutionalists who see the progress made as validation of the impact of international organizations and cooperation on international relations. They also see a triumph in the proliferation of “universal” norms of human rights, democratization and the rule of law. Indeed, the proliferation of ICTs, mixed tribunals, universal justice, and the establishment of the ICC signal an increased global commitment toward accountability for international crimes. Yet realists who scoff at the notion of international institutions should pay attention because recent history suggests that the prosecution of war criminals may actually affect the course of conduct that nations take in their external and internal activities. Some commentators have welcomed the movement for global justice as a needed assault on the institution of state sovereignty.<sup>2</sup> Although state sovereignty will continue to be the bedrock of international relations, the international community is increasingly demanding that sovereignty be exercised responsibly.<sup>3</sup>

International legalism means the development of international legal norms. Legal norms include at a minimum an independent judiciary, fair trials, due process, timely proceedings, and competent defense attorneys. Moreover, progress in the law of armed conflict and human rights law has limited the means, methods and conduct of nations (and individuals) when they engage in international and internal armed conflict. These developments have affected state sovereignty and constrained policy choices of governments. For example, states must be more careful during internal and external

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<sup>2</sup> Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, New Press, New York, 2001, introduction, p. xxx.

<sup>3</sup> See for example Gene M. Lyons and Michael Mastanduno, *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore, MD: Johns Hopkins University Press, 1995) and Francis M Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild, and I. William Zartman, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, DC: The Brookings Institution, 1996).

warfare, in the treatment of prisoners and in the arenas of civil and human rights due to obligations that they have incurred by signing certain treaties and joining organizations such as the United Nations.

Finally, post-conflict reconstruction means those actions taken by states and the international community in conjunction with peacekeeping and peace building efforts that seek to rebuild and reconstruct societies in the wake of armed conflict. These efforts are typically coordinated by a United Nations agency in coordination with other donor states, international non-governmental organizations (NGOs), domestic civil society (if it exists), the post-conflict state and any UN or regional force that is established to conduct security operations in support of the peace building process.

Prior to the end of the Cold War, the confluence of these three trends in post-conflict justice was not apparent. The political development of international criminal judicial institutions, sometimes described as the Nuremberg legacy, is notable for the lack of momentum during the Cold War contrasted against the variety of post-conflict judicial institutions developed since the early 1990s. Yet, the legal legacy of post-conflict justice as a part of international human rights law and international humanitarian law<sup>4</sup> is also remarkable due to its continued, but untested, development during the Cold War and the rapidity of its growth, influence and application since. Like any area of law and politics, the choices that have to be made in the realm of justice and accountability are complex and controversial. The consequences of granting amnesties for international crimes or the absence of action at the international or national level can, in effect, mean impunity for individuals who have committed atrocities. However, if action is to be taken against perpetrators of these criminal acts, the forum selected must be conducted fairly and must adhere to international judicial norms and standards.

Tribunals are the most accepted form of post-conflict justice at both the international and national levels. However, a state must have the capacity to try complex international crimes cases and possess an independent judiciary that can conduct fair trials without undue influence from the government or any other party. If an international tribunal is selected as the appropriate forum, the international community must strike a

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<sup>4</sup> The Law of Armed Conflict (LOAC) is a sub part of International Humanitarian Law.

balance between achieving justice for the sake of humanity and helping to rehabilitate and build the capacity of the post-conflict state where the criminal acts occurred and the victims still reside, if post-conflict justice is to survive beyond the tenure of the international tribunal. No matter what form of post-conflict judicial institution is chosen, it must reflect certain principles that adhere to international norms such as impartiality, independence and fundamental fairness. The tribunal must also be able to be established and act in a timely manner for the victims, the defendants and for the post-conflict reconstruction process.<sup>5</sup>

Although states have the primary right to prosecute their citizens and others who commit international crimes on their territory, many post-conflict states lack the necessary tools to do so. Typically, legal capacity in terms of experienced personnel; physical infrastructure, investigative capability and resources will be poor to non-existent. Further, in many post-conflict states, international legal norms such as judicial independence, due process and an open trial process will have been curtailed if they had existed at all. Incompetence, corruption and lack of ability mean that many post-conflict states either cannot or will not prosecute individuals for international crimes.

Post-conflict states have attempted to deal with these incapacities through the establishment of a truth and reconciliation commission (TRC). These fora can be very useful for the reconciliation process and are often used in coordination with trials either at the national or international levels. Unfortunately, TRCs by themselves do not meet national or international standards for justice. The establishment of a record through the liberal use of amnesties and immunities may help the nation heal but they do not force accountable individuals to take full responsibility for their crimes. However, TRCs working in tandem with a post-conflict judicial institution can help create a record and serve as a forum where low-level war criminals can acknowledge their actions, be held accountable and reconcile with their societies.

## **2. The Nuremberg Legacy- Accountability**

The realization during the 1990s of international tribunals prosecuting international crimes (war crimes, crimes against humanity and genocide) can be seen as

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<sup>5</sup> Human Rights Watch, "Justice for Iraq: A Human Rights Watch Policy Paper," New York, December 2002, <<http://www.hrw.org/background/mena/iraq/1217bg.htm>> (Feb 27, 2003).



the fulfillment of the Nuremberg legacy. The gist of the Nuremberg legacy is that individuals responsible for the most heinous and egregious of international crimes would be held to account for their actions in a court of law rather than being summarily executed as some Allied leaders wanted.<sup>6</sup> Of course, the main distinction between the prosecutions in 1946 and those of more recent vintage is that tribunals today have largely avoided the stigma of being called “victors justice.”

Today, international criminal tribunals are not pursuing victors’ justice, but global justice. This distinction wipes away the charge that the vanquished must suffer justice at the whim of the winning side, but it does not take the political element out of the process. In fact, politics continues to play a large part in international crimes prosecutions from the selection of the type of forum, to funding to the enforcement of the will of the court. Therefore, tribunals in The Hague, Arusha, Freetown, and Dili have much more in the way of legitimacy, at least on the international level than they have power.

Directly after World War II a movement arose to set up a permanent international criminal court in order to capitalize on the precedent set by the International Military Tribunals (IMTs) in Nuremberg and Tokyo. The International Court of Justice had been made a part of the UN system, but it only had jurisdiction over states and then only with their consent. Therefore, the UN directed the International Law Commission (ILC) to draft a statute for a criminal court. Due to the onset of the Cold War, any cooperative effort toward fulfilling the Nuremberg legacy disappeared. It was not until after the fall of the Iron Curtain and the start of the Balkan wars in the early 1990s that an earnest call for an international criminal tribunal went out.

The first international efforts, the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR) were established in 1993 and 1994 respectively. Over their short history they have demonstrated the strengths and weaknesses of efforts to bring war criminals to justice. The drive to establish the ICTs revived dormant efforts to pursue a standing international criminal court (ICC). The revival culminated in a conference in Rome in July 1998 where representatives from across the world overwhelmingly voted for the draft Rome Statute that serves as the

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<sup>6</sup> Churchill and Stalin were advocates of this approach, but were opposed by Roosevelt and his Secretary of War, Stimson. Citation needed. See Gary Bass, *Stay the Hand of Vengeance: The Politics of International War Crimes Tribunals*, Princeton University, New Jersey, 2000, pp. 7-10.

underlying treaty and law for the ICC. The treaty then received the necessary sixty ratifications in fewer than four years and the Court officially stood up in July 2002.

Yet the IMTs, ICTs and the ICC are not the only venues for the prosecution of international crimes devised by the international community. Since 1999, at least four separate mixed or hybrid tribunals have combined international efforts and expertise with local legal professionals to bring those most responsible for heinous crimes to justice with local judicial actors from the state where the crimes took place. One approach typified by the Special Court in Sierra Leone stems from an agreement between the Government of Sierra Leone and the United Nations Security Council.

Another type of mixed tribunal used in East Timor uses Special Panels that combine international judges and lawyers from the United Nations and local judges and lawyers who have been screened and trained to take a more active role now and a permanent role later. These approaches have bolstered the capacity of state actors to prosecute such offenses on their own and have allowed international norms to positively influence the conduct of the tribunals.

The Nuremberg legacy has been fulfilled. The various forms of international and mixed tribunals have evolved since the resurgence of international criminal law began in the early 1990s. The reasons for the different forms are a result of political maneuvering and the unwillingness of some states to cede sovereignty and diplomatic options to an independent international criminal court. Still, these institutions represent a step away from victors' justice and a step toward a global justice system with norms that reflect impartiality, judicial independence and fundamental fairness. To that end, all of these institutions stand up to the Nuremberg legacy.

### **3. The Law of Post-Conflict Justice**

On the international level, the laws that govern post-conflict justice tribunals are derived from two main sources. The first, international humanitarian law (IHL) includes the law of armed conflict, composed mainly of the Geneva Conventions of 1949 and their additional Protocols adopted in 1977. This body of law is the basis for most definitions of war crimes. The second source, human rights law (HRL), is an outgrowth of universal or natural law and war first codified in the 1948 United Nations sponsored Universal Declaration of Human Rights and in the Genocide Convention that soon followed. Both

IHL and HRL initially sought domestic enforcement against individuals or international enforcement against states in the tradition of public international law.<sup>7</sup> They were traditionally separate and distinct but have merged together over the past 50 years.<sup>8</sup> The melding of these two regimes has been essential for international judicial mechanisms to assert jurisdiction over internal armed conflicts and domestic security operations, conduct normally outside the scope of international law.

International law derives from several sources. First, there is treaty law whereby states in return for the benefits of a legal regime in an anarchic international system, forfeit some of their sovereignty. The second source of international law is customary international law derived from the customs and practices of nations. It is under this natural law theory “that some rules of international humanitarian law [and human rights law] once considered to involve only the responsibility of states may also be a basis for individual criminal responsibility.”<sup>9</sup> The final source of international law that is important for this discussion is case law such as rulings by the ICTY that have expanded the reach of international law into internal armed conflict, these rulings reflecting both international treaty law and customary international law<sup>10</sup> have in turn been incorporated into the ICC’s Rome Statute.<sup>11</sup>

The ICC is just the latest international treaty that has incorporated changes to international law. Yet, coming as it did at the end of the twentieth century, it was a clear

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<sup>7</sup> Alex G. Peterson, “Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict,” *Military Law Review*, Vol. 171, (March 2002) 1-90, 32. The formal confluence of these regimes can be traced to at least 1977 with the adoption of “the fair trial provisions of the 1966 International Convention on Civil and Political Rights in the two Protocols additional to the Geneva Conventions.”

<sup>8</sup> Campbell, Colin, “Peace and the Laws of War: The Role of International Humanitarian Law in the Post-Conflict Environment,” *International Review of the Red Cross*, No. 839, 30 September 2000. Pp. 627-651.

<sup>9</sup> Theodor Meron, “War Crimes Law Comes of Age,” *American Journal of International Law*, Volume 92, Issue 3 (Jul., 1998) 462-468, 467 Theodor Meron, “War Crimes Law Comes of Age,” *American Journal of International Law*, Volume 92, Issue 3, (Jul., 1998) 462-468, 464.

<sup>10</sup> Kenneth W. Abbott, “International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts,” *American Journal of International Law*, Vol 93, Issue 2, (Apr., 1999), 361-379, 378.

<sup>11</sup> Jonathon Charney, “Progress in International Criminal Law?” *American Journal of International Law*, Volume 93, Issue 2, April 1999. Pp. 452-464, 454. “The ICTY and the ICTR have legitimated the prosecution of international crimes to the international community and have elaborated on the pertinent law through their statutes, rules, and judgments.” He continues by stating, “Throughout these advances governments have become accustomed to the idea that international criminal law constitutes a real and operative body of law...”

statement that the changes that have gone on in the IHL and HRL regimes through treaty, customary and case law would be combined under the heading of international criminal justice. Writing before the ratification of the ICC in 1998, Professor Theodor Meron foresaw that “the probable inclusion in the International Criminal Court of common Article 3 [of the Geneva Conventions] and crimes against humanity, the latter divorced from a war nexus connotes a certain blending of international humanitarian law with human rights law and thus an incremental criminalization of serious violations of human rights.”<sup>12</sup>

Despite progress toward universal acceptance of these new international legal norms, not all nations accept them in total and even when they do, states have let political concerns outweigh legal obligations under international law. For example, the United States, which was the driving force behind many of the developments in IHL and HRL and has supported both the ICTY and ICTR has explicitly exempted itself from both of the 1977 additional Protocols and has refused to sign on to the ICC. At the same time, the United States has signed up to more than one international treaty that has called for the arrest and prosecution of individuals responsible for international crimes such as torture, genocide, apartheid and slavery under the concept of universal jurisdiction.<sup>13</sup>

Another issue where the dictates of international law clash with the realpolitik concerns of statesmen who are trying to resolve conflict is that of amnesties. Provisions in several treaties dealing with crimes such as torture and genocide, for example, have placed limits on the ability of sovereign states to act grant or recognize amnesties given to leaders who have been or may be accused of international crimes. Historically, peace agreements or pacted transitions have given such leaders amnesties in order to guarantee a smooth transition during a post-conflict process.<sup>14</sup> The price of amnesty is often immunity for the actor. However, it is increasingly being recognized that international

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<sup>12</sup> Meron, p. 468.

<sup>13</sup> Charney, *Progress*, p. 455. See also *The Economist*, “Belgium’s Genocide Law: Too Embarrassing,” Vol. 367, No. 8320, April 19, 2003, p. 43. The Belgian government bent to US pressure and amended a law that allowed for broad prosecutions under universal jurisdiction.

<sup>14</sup> Ruth Wedgwood and Harold J. Jacobson, “Foreword: Symposium: State Reconstruction After Civil Conflict,” *American Journal of International Law*, Vol 95, Issue 1 (Jan., 2001), 1-6, 1-2. Some commentators argue that amnesties are an essential tradeoff especially in democratic transitions such as the one that occurred in South Africa or in the conclusion of internal conflicts that are resolved through negotiation and concession instead of a complete victory by either side.

obligations under treaty or universal jurisdiction hamstring the ability of the international community to give amnesties.<sup>15</sup> States can grant amnesties within their borders, whether legal or not in the eyes of the international community, but the individual's movement is limited as he or she will run the risk of arrest and prosecution upon leaving his or her home country.

When states seek to prosecute international crimes such as war crimes, crimes against humanity and genocide, they can pursue several different legal avenues. First, they can use international law as incorporated into their domestic law as required under the terms of a treaty such as the Geneva Conventions.<sup>16</sup> This option is logical especially for states that have not developed their own body of domestic law for the types of conduct covered by international criminal law. The second legal option is for states to prosecute the underlying conduct under their own law. For instances where mixed tribunals are established, the law used will most likely be a combination of international criminal and domestic law, but the international community will insist that whatever law is used, it must adhere to international standards.

For current and future international tribunals the law of post-conflict justice will continue to grow as the ICC is established and begins to make case law. Precedents made by mixed and ICTs as well as states prosecuting individuals under the theory of universal justice will also be influential in the development of international criminal law. Yet states will continue to apply both international criminal law and their own rules and laws against perpetrators. However, with the growth of an international criminal law community and evolving international standards for criminal justice, the international community, specifically the ICC will be scrutinizing state actions to ensure that states are not conducting sham prosecutions to protect individuals. This scrutiny will further fuel the controversy between post-conflict justice and sovereignty.

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<sup>15</sup> Carsten Stahn, "United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?" *International Review of the Red Cross*, Vol 84, No. 845, March 2002, pp. 200-01. At the signing of the Lome accord, in July 1999 the SRSB made a verbal disclaimer to his signature stating that the amnesty provisions did not apply to international crimes committed during the Sierra Leone conflict.

<sup>16</sup> The four Geneva Conventions were signed on 12 August 1949. Obligations are implemented through DoD Directive 5100.77, "DoD Law of War Program," December 9, 1998.

#### 4. Post-Conflict Justice and Sovereignty

Perhaps the most controversial issue to arise in post-conflict judicial situation is sovereignty. Despite the erosion of absolute sovereignty through the growth of international institutions, organizations and treaty obligations, many nations resent any actions perceived as undue international interference in state affairs. Most states assert that the primary jurisdiction for the prosecution of international crimes and other atrocities belongs with the nation state. This view is supported by international law and reflected by the inclusion of the concept of complementarity in the Rome Statute.<sup>17</sup> By ratifying the Rome Statute and becoming a party to the ICC states have given the court the right to make the decision as to whether that will or capacity exists.<sup>18</sup> Moreover, states of the former Yugoslavia have been forced to turn over nationals to international tribunals operating under U.N. Security Council authority. Ultimately, the prosecution of state nationals before an international tribunal due to treaty obligation, Security Council authorization or under the concept of universal jurisdiction will test the sovereignty of the state and the legitimacy of such tribunals in the eyes of the populations of post-conflict states.

The practice and development of international criminal law in particular has broken down barriers to prosecuting individuals for criminal acts that were once under the exclusive domain of the sovereign state. Sovereignty, once inviolate under the Westphalian system, has been eroded significantly since the end of World War II.<sup>19</sup> This trend has caused some governments to see an independent ICC, unaccountable even to

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<sup>17</sup> Rome Statute of the International Criminal Court, Article 17. Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. Under complementarity, the ICC will defer the prosecution of accused war criminals to the state unless the state will not or cannot conduct the prosecution on its own.

<sup>18</sup> Sarah B. Sewell and Carl Kaysen, (eds.) *The United States and the International Criminal Court: National Security and International Law*, Rodman and Littlefield, New York, 2000. Page 3

<sup>19</sup> Robertson, p. xxx. Some see sovereignty as an outdated model of international order and that the “movement for global justice has been a struggle against sovereignty – the doctrine of non-intervention in the internal affairs of nation states asserted by all governments which have refused to subject the treatment they mete out to their citizens to any independent external scrutiny.”

the UN Security Council, as a menace that would create laws or impose restrictions that would impinge upon their national interests even when the prosecution of international crimes is the goal.<sup>20</sup>

This tension between international criminal justice and national interests highlights a larger question related to international legalism, independent international institutions and sovereignty. In the case of international justice, some argue that in order “to vindicate international norms effectively” international justice institutions must be structured for “impartiality, expertise and political independence.” These considerations must be weighed against “sovereignty costs” of diminished national autonomy.<sup>21</sup> But despite the legalist restraints put upon governments by their obligations under international law, an examination of the case studies in this thesis will demonstrate that under most conditions, states still act according to their interests notwithstanding liberal assertions to the contrary.

The international community is not about to abandon the principles of sovereignty. At a December 2001 address at the Peace Palace in the Hague, Pierre Prosper, the State Department’s Ambassador-at-Large for War Crimes Issues asserted that the “international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible...International tribunals are not and should not be the courts of first redress, but of last resort.”<sup>22</sup> He went on to remind the audience that the even the ICTs have concurrent, not just primary, jurisdiction with states over the crimes that they are authorized to prosecute.<sup>23</sup> The principle of complementarity enshrined in the ICC statute is further evidence that the international community has not allowed the concept of sovereignty to fully erode.

States are not about to hand over responsibility for the prosecution of crimes, to an international body without good reason. “To allow its own nationals or aliens charged with the commission of crimes on its territory to be prosecuted by a distant international tribunal would deprive the state of control and suggest the inadequacy of its legal

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<sup>20</sup> Sewell, p. xi. See also Charney, *Progress*, p. 455.

<sup>21</sup> Abbott, p. 375.

<sup>22</sup> Pierre Richard Prosper, “Address at the Peace Palace in The Hague,” December 19, 2001, <<http://www.state.gov/s/wci/rls/rm/8053.htm>> (Feb 13, 2003)

<sup>23</sup> Ibid.

system.”<sup>24</sup> But the international community may have to step in especially where states fail to uphold the rule of law. “Where no action or insufficient action is taken at the national level (as in the case of the former Yugoslavia and Rwanda), the obligation falls upon the international community...Since maintaining the rule of law is a good in itself, the quasi-moral obligation to uphold the rule of law falls upon the State, in the first instance, and then upon the international community.”<sup>25</sup> Moreover, states may find it expedient to have the international community prosecute cases for them due either to political sensitivity or due to the lack of capacity to prosecute on their own.<sup>26</sup> But as Neil Kritz points out “if the state is relieved of the need to face these issues, leaving them to be handled and concluded by outsiders (and therefore easily disowned by local leaders if that becomes politically expedient), then the experience may contribute less to a durable peace and the entrenchment of the rule of law.”<sup>27</sup>

The international community can assert jurisdiction over perpetrators of international crime in sovereign states several ways. First, the Security Council may make a determination that there has been a threat to international peace and security under Chapter VII of the U.N. Charter. The ICTs and international assistance to courts in East Timor and Kosovo were set up under this method. By contrast, in Sierra Leone and Cambodia, the mixed tribunals were set up pursuant to agreements between the Security Council and the host governments.<sup>28</sup>

The Security Council has vested the ICTY and ICTR with the authority to demand the production of suspects from the Balkans and for African states where

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<sup>24</sup> Jonathon Charney, “International Criminal Law and the Role of Domestic Courts,” *American Journal of International Law*, Volume 95, Issue 1, (January 2001) 120-124.122.

<sup>25</sup> Campbell, p. 633-34.

<sup>26</sup> Charney, *International Criminal Law*, p. 122. “In some circumstances, a state may find it in its interest to allow a prosecution to go forward before the ICC, considering the matter too dangerous to be handled domestically and preferring trial before a distant international tribunal. In other situations, the state may not be capable of properly prosecuting an international criminal matter.”

<sup>27</sup> Neil Kritz,, “The Rule of Law in the Postconflict Phase,” in Crocker, Chester A., Hampson, Fen Osler, and Aall, Pamela (eds.), *Turbulent Peace: The Challenges of Managing International Conflict*, United States Institute of Peace Press, New York, 2001, p. 817.

<sup>28</sup> Rolf Ekeus, “New Challenges for the United Nations,” in *Turbulent Peace*, p. 521. In the case of the ICTR, the Security Council made a controversial move by asserting jurisdiction over conduct that occurred totally within the sovereign state of Rwanda. The use of this principle, humanitarian intervention, was also used to justify NATO’s intervention in Kosovo in 1999. However, this concept seems to be at odds with the UN’s principle of non-interference and it will remain to be seen how these precedents will be used in the future.



criminals have taken refuge. A provision in the ICC statute gives the Court the option of requesting that the Security Council gives similar authority to the ICC when states will not comply with their obligations under treaty or when the accused is the citizen of a non-party state. However, since the United States and China are opposed to both the ICC and toward jurisdiction over non-party citizens, it is difficult to see how this provision will be implemented.

The second way the international community can assert jurisdiction is through treaty obligation. An example would be an extradition treaty. Under the ICC statute, state parties have explicitly agreed that the ICC can make a determination that a state party cannot or will not investigate and or prosecute a suspected international criminal. This treaty provision gives the ICC a deep reach into the sovereign territory of the states party.<sup>29</sup> Similarly, an invitation by a government for the international community to assist in rebuilding a post-conflict society may well indeed involve the granting of powers to prosecute international criminals. For example, Sierra Leone has voluntarily opted to open up its legal system to international assistance. The final way for the international community to assert jurisdiction is through universal jurisdiction.

The citizens of the post-conflict state and the perpetrators home countries will question legitimacy of assertions of jurisdiction by international tribunals over international crimes. Even when such an action is judged legal under international law, the action may still not be considered legitimate and a backlash against the international community may develop.

Issues related to the exercise or infringements of state sovereignty are only some of the challenges that face the international community in post-conflict justice. Once a tribunal is formed and comes into existence, it will have to effectively prosecute international crime without exacerbating the underlying conflict. It will also need to gain and maintain the support of the international community and the post-conflict state in enforcing international criminal law. Even more daunting are the challenges of rebuilding the capacity of the state to conduct justice in accordance with international standards and

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<sup>29</sup> Marc Grossman, Under Secretary for Political Affairs, "American Foreign Policy and the International Court: Remarks to the Center for Strategic and International Studies," United States Department of State, Washington, DC May 6, 2002 <<http://www.state.gov/p/9949pf.htm>>, (February 13, 2003).

adhere to the rule of law. These post-conflict judicial institutions need to be able to not only apply international criminal justice norms, but they also need to be able to build upon them.

## **5. Evaluating Post-Conflict Justice Institutions**

The post-conflict judicial institutions represented in the subsequent chapters will be evaluated on their effectiveness at building legal capacity, developing international criminal law and maintaining support for post-conflict justice. Capacity building can be gauged in two ways. First an institution or approach can be evaluated on how well it helps build the tangible components of a legal system. Tasks here may include the training of lawyers and judges, and the building of infrastructure and the development of laws and procedures that meet international standards. The second part of capacity building, the transfer of international legal norms into the local legal culture, is softer, but just as important. A long-term effect of these institutions should be to advance the international legal norms that allow a state to conduct its legal proceeding pursuant to the rule of law. Indicia of the normative transfer should include: independent judiciaries, fair trials and rules that reflect fundamental fairness in criminal proceedings.

These post-conflict justice institutions also have an ability to make an impact on the overall development of international criminal law through the prosecutions. Developments can be made through case law, procedural practice, and relations with international bodies and states or by the fact that the international community has agreed to the establishment of the institution in the first place.

Support for these institutions depends to a degree on their ability to cooperate with the international community, and the post-conflict states that are the institutional focus. Support can be measured by maintaining independence from interests that run counter to the mission of the institution and the ability to get the international community and donor states to back the enforcement of the institution's authority with funding, legal resources and military power.

Even when post-conflict tribunals are set up or have demanded compliance from a state, group or individual, the tribunal itself has very little in the way of enforcement powers. The ability of the tribunal to impose its will depends a great deal on the political

will of the international community and the degree of political, economic and military force that states will use to support the institution for the enforcement.

## **6. Conclusion**

Post-conflict judicial institutions are an essential element of post-conflict reconstruction because they address the most egregious abuses of international law committed during armed conflicts and promote a growing global consensus about human rights and the rule of law. The question to be addressed in subsequent chapters is: how can the international community maximize the effectiveness of these institutions?

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## **II. UNILATERAL APPROACHES**

### **A. INTRODUCTION**

This chapter examines institutions that operate solely on the international level without any coordinated efforts or mechanisms on the state level. These institutions will first be evaluated on several criteria to determine if they are working and why. These criterion are: the ability to positively impact the development of legal capacity in the post-conflict state thereby transferring international legal norms to the post-conflict state, the ability of these approaches to contribute to the growing corpus of international law, and their ability to gain and maintain the support of the international community and post-conflict states. This exercise will help identify the major advantages and problems with each approach. The analysis will determine if the approaches are truly effective in providing and institutionalizing long-term commitment to international legal norms or if the approaches are superficial and subject to politicization and marginalization.

### **B. INTERNATIONAL TRIBUNALS AND UNIVERSAL JURISDICTION**

#### **1. International Criminal Tribunal for the Former Yugoslavia (ICTY)**

Currently, there are two types of international criminal tribunals (ICTs) functioning to prosecute international crimes. The current ad hoc ICTs are the International Criminal Tribunal for the Former Yugoslavia (ICTY) located in The Hague, Netherlands and the International Criminal Tribunal for Rwanda (ICTR) located in Arusha, Tanzania. The second type of international tribunal is the International Criminal Court (ICC). This tribunal, also located in The Hague is still in the formation stage, but will have a much wider scope and jurisdiction than that of the ad hoc tribunals. Finally, some national courts have used universal jurisdiction to indict and prosecute individuals for international crimes that had no nexus to the trial venue.<sup>30</sup>

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<sup>30</sup> Meron, p. 464. Progress made in the Hague and Arusha through case law and lessons learned, have greatly influenced the legal foundations for the ICC. Judge Meron, the current president of the ICTY's Judicial Chambers, suggests that there is "a synergistic relationship among the statutes, of the international criminal tribunals, the jurisprudence of the Hague Tribunal, the growth of customary law, its acceptance by states, and their readiness to prosecute offenders under the principle of universality of jurisdiction." He points out that rulings from the ICTY, "clearly helped to create the environment for some of the developments in the Preparatory Committee on the Establishment of an International Criminal Court."

The ICTs were set up relatively quickly and started to deal with complex international war crimes investigations in situations where the national level authorities had little capability or control. The Security Council Resolutions authorizing the ICTs directed member states to comply with demands by the tribunals.<sup>31</sup> In theory then, these tribunals should have the full force and effect of the United Nations. But such backing can come at a price. The ICTs have in turn been criticized for being tools of the Security Council, and for being costly, timely and inefficient (by member of the Security Council). Institutionally, the ICTs have been charged with mismanagement, lack of professionalism, inefficiency, cost overruns, and with being too slow in the prosecution of cases.<sup>32</sup>

United Nations Security Council Resolution 827 established the ICTY in May 1993. It was set up quickly, due in part to the existence of the International Law Commission work that had been ongoing since the 1940s to set up an international criminal court.<sup>33</sup> The initial purpose of the ICTY was to prosecute cases arising out of the conflict in the former Yugoslavia between 1991 and 1995, but it later took jurisdiction over cases arising out of the internal conflict between Serbia and ethnic Albanians in Kosovo during 1998-99.

Now in its eleventh year, the ICTY is not envisioned to finish its work until at least 2007 although some observers have estimated that cases could still be working through the appeals process until as late as 2016.<sup>34</sup> Since 1993, the ICTY has indicted seventy-five suspects and has completed trial proceedings against thirty-seven of them.

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<sup>31</sup> Paul Tavernier, "The Experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda," *International Review of the Red Cross*, No. 321, Dec 31, 1997, pp. 605-621, 606. <<http://www.icrc.org/Web/eng/siteen0.nsf/iwpList197/A84C98727641A195C1256B66005...>>, (December 11, 2002)

<sup>32</sup> Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, "UN International Criminal Tribunals for Rwanda and the Former Yugoslavia: Statement before the House International Relations Committee," February 28, 2002, <<http://www.state.gov/s/wci/rls/rm/2002/8571.htm>> (Feb 13, 2003). See also Human Rights Watch, "Justice for Iraq" These charges have led to reviews of the ICTs by the United Nations and a recognition that future ad hoc ICTs, and mixed tribunals will incorporate lessons that will ensure more effective and efficient proceedings. For example, future ICTs will probably have time limits put on them similar to the mandate for the Special Court in Sierra Leone.

<sup>33</sup> William Schabas, "International Law and Response to Conflict," in *Turbulent Peace*, p. 611.

<sup>34</sup> Prosper testimony, Feb 28, 2002. See also Daryl A. Mundis, "Improving the Operation and Functioning of the International Criminal Tribunals," *American Journal of International Law*, Vol 94, Issue 4 (Oct., 2000), 759-773, 770-771.

Currently, eight suspects including former Serbian president, Slobodan Milosevic are on trial in the tribunal's three trial chambers.<sup>35</sup>

*a. Analysis of Effectiveness*

1. Capacity Building. Until recently, the ICTY had no programs designed to bolster judicial capacity in post-conflict states. Very belatedly and probably in response to calls from the United States for a better division of labor between the ICTY and national courts, the ICTY has become involved in capacity building in Bosnia and the Republic of Srpska. The Bosnia Court for war crimes will operate under the Office of the High Representative (OHR), the international body created to administer the post-conflict reconstruction of Bosnia-Herzegovina by the Dayton Accords, and involve a combination of international and national lawyers and judges. This scheme is based on a need to alleviate a huge caseload, speed the administration of justice and to bring the face of justice back to Bosnia and Herzegovina. It is too early to evaluate these initiatives, but some observers are concerned that the budgetary resources and political will do not exist to make these courts successful.<sup>36</sup>

Exclusive of these recent initiatives by the Court, the capacity building efforts that have taken place in the former Yugoslav republics have been in spite of the ICTY, not because of it. Post-conflict judicial capacity initiatives have been motivated first, by efforts to pre-empt ICTY prosecutions and second by judicial reforms mandated by conditionality requirements imposed by western powers such as the United States and the European Union. Both the US and EU have required states like Croatia, Serbia and Macedonia to institute judicial reform in order to qualify for further funding, assistance, and future participation in organizations such as the EU and NATO.<sup>37</sup> In this

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<sup>35</sup> United Nations, "Fact Sheet on ICTY Proceedings," Update: 2 June 2003, <<http://www.un.org/icty/glance/procfact-e.htm>>, and United Nations, "Public Indictments," Update 2 June 2003, <<http://www.un.org/icty/glance/indictlist-e.htm>>, (June 5, 2003). The ICTY can handle up to nine trials at a time. Its trial chambers each have at least three trial panels that hear cases.

<sup>36</sup> Anes Alic, "Reinventing the Hague," January 21, 2003, *Transitions Online*, from Lexis-Nexis Database (Lexis-Nexis Current Issues, R227-146) <http://www.lexis-nexis.com/ciuniv>. (March 2 2003). Also "A Demanding Justice," 24-30 September 2002, *Transitions Online*, (Lexis-Nexis Current Issues, R227-117): <http://www.lexis-nexis.com/ciuniv>. (March 2 2003).

<sup>37</sup> Nina-Bang-Jensen, "Briefing: Serbia After Milosevic: A Progress Report," *Commission on Security and Cooperation in Europe*, March 6, 2001, <[http://www.csce.gov/witness.cfm?briefing\\_id=178&testimony\\_id=127](http://www.csce.gov/witness.cfm?briefing_id=178&testimony_id=127)>, (June 5, 2003). See also Delegation of the European Commission to the Republic of Croatia, "Croatia the European Contribution: Milestones in the relations between the European Union and Croatia," European Union,

sense, capacity building has, in part, been a defensive emulation of the judicial systems familiar in the developed states of Europe and North America.

Since these capacity building efforts have been undertaken in order to thwart the ICTY and to meet short-term conditionality, it may be proper to question how deeply the new judicial structures have operationalized international legal norms. Included in these norms is the deterrent effect that strong judiciaries have under the rule of law. Courts in all of the former Yugoslav countries have been criticized for politicized verdicts, especially when the accused is seen as either a war hero or as a war villain. Additionally, both local prosecutions and the ICTY failed to stop the war in Bosnia from 1993-95, including the massacre at Srebrenica, and failed to prevent Serbian forces from committing atrocities in Kosovo during 1998-99. Furthermore a direct warning by the prosecutor to Serb President Slobodan Milosevic did not deter him from carrying out his aggressive campaigns.<sup>38</sup>

The ICTY has only recently sponsored the establishment of locally run war crimes courts in Bosnia, but capacity building has been mostly undertaken in order to either pre-empt the court or to satisfy other international interests. The normative impact of this capacity has mitigated some nationalism and marginalized some politicians, but has not been truly accepted by the parties to the conflict. These factors

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<<http://www.delhrv.cec.eu.int/en/item1/item1/htm>>, (June 5, 2003) and European Union, "The EU's Relations with the Former Yugoslav Republic of Macedonia: Stockholm European Council – Presidency Conclusions," External Relations, March 23-24, 2001, <[http://europa.eu.int/comm/external\\_relations/see/fyrom/ec\\_stockholm.htm](http://europa.eu.int/comm/external_relations/see/fyrom/ec_stockholm.htm)>, (June 5, 2003)

<sup>38</sup> Schabas, p.612. Yet, some observers argue that the indictment of Bosnian Serb leaders leading up to the Dayton Accords marginalized them and allowed more moderate leaders to travel to Ohio to make the peace. Of course the real answer may have been that the United States had decided to marginalize the Bosnian Serb leaders anyway and the indictments just gave a convenient excuse to keep them out of the negotiations. See Ivo H. Daalder, "Getting to Dayton: The Making of America's Bosnia Policy," *Brookings*, Washington, D.C. 2000, pp 127-129. In Daalder's description, Ambassador Holbrook never intended to deal with Bosnian Serb leaders because he saw Milosevic as the real power that had to be dealt with. While it is debatable whether the indictments of Mladic and Karadzic helped stop the war, they certainly marginalized them in their ability to bargain their way out of trouble and continue in Bosnian politics. As Akhavan points out "The experience of the ICTY suggests that with sustained international pressure, indicted leaders have limited room to insist on an amnesty deal as a precondition to surrendering power." Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* pg 18.

<sup>38</sup> International Criminal Tribunal for the Former Yugoslavia, "Press Briefing – 31 March 1999: Statement by the Prosecutor," The Hague, 31 March 1999, CC/PIU/391-E, <<http://www.un.org/icty/pressreal/p391e.htm>>, (June 16, 2003). For an account on the Milosevic indictments, see Ivo. H. Daalder and Michael. E. O'Hanlon, *Winning Ugly: NATO's War in Kosovo*, Brookings, Washington, D.C. 2000, pp. 205-06.



indicate that the emulative capacity building and normative change may be superficial endeavors and will not be fully operationalized after the international focus has moved.

2. Development of International Criminal Law. The development of international criminal law has been the main strength of the ICTY. The legacy of the court includes: the expansion of international criminal law into new areas of the law, the definition of the jurisdiction of the court as an institution, and finally the practice of procedural international criminal law. Specifically, the ICTY expanded the application of the Geneva Conventions, further developed the doctrine of command responsibility, and for the first time established rape as a form of torture and a crime against humanity.<sup>39</sup>

The Tadić case allowed the ICTY to expand its jurisdiction into cases that many had asserted were outside the scope of international humanitarian law. According to Justice Richard Goldstone, the first prosecutor for the ICTY, the Appeals Court in the Tadić decision made it clear that the distinction between international and internal conflicts could not be sustained.<sup>40</sup> This decision had huge implications for international humanitarian law, international criminal justice, state sovereignty and for the Court itself. Indeed, the Court validated its own lawful establishment by the Security Council, and the primacy of its rulings over those of courts in the former Yugoslavia. Significantly, “the judges confirmed that customary international law no longer requires any connection between crimes against humanity and armed conflict of any character.”<sup>41</sup>

Finally, through the practice of international criminal law since 1993, the ICTY, has made significant advances in procedural international criminal law.<sup>42</sup> These advances in substantive and procedural international criminal law have been credited with creating an environment that led to developments for the ICC.<sup>43</sup> Moreover, these practices have helped shape the structure and procedure for other international tribunal such as the ICTR and the Special Court for Sierra Leone.

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<sup>39</sup> ICTY Website, “General Information,” 2 May 2003, <<http://www.un.org/icty/glance/keyfig-e.htm>> (May 8, 2003).

<sup>40</sup> Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator*, Yale, New Haven, 2000, p. 124.

<sup>41</sup> David J. Scheffer, “International Judicial Intervention,” *Foreign Policy*, Vol No. 196, (Spring 1996) 34-51, 40.

<sup>42</sup> Goldstone, p. 123.

<sup>43</sup> Meron, p. 464.

3. Support for the ICTY. The ICTY needs the support of the United Nations (the international community in general, but the Security Council members and other European states specifically) and the cooperation of the former republics of Yugoslavia to be effective. According to the ICTY, support and cooperation are vital for the collection of evidence the detention and transfer of detainees and the contribution of personnel and financial resources.<sup>44</sup> Moreover, the Court needs the political, economic and sometimes military power of the international community in order to carry out its mandate and it needs the support and cooperation of the post-conflict states in order to meet the challenges of capacity building, and the development of international criminal law.

Despite the initial enthusiasm by the international community for the tribunal, real support in the forms of funding, resources and enforcement mechanisms were slow in coming.<sup>45</sup> NATO, the multinational force tasked with securing the peace in Bosnia was extremely hesitant to take on the mission of arresting indicted war criminals out of the fear that it would divert resources from peacekeeping and put the lives of the peacekeepers at risk. Security Council members were similarly reluctant to provide adequate resources to the Court in the early years. However, the activism by the prosecutor and the chief judge as well as the indictments (and marginalization) of several key Bosnian Serb leaders made Western powers see the ICTY as yet another tool to use against the Bosnian Serb government to stop the war.<sup>46</sup> Only then did resources begin to flow and significant progress begin to be made in the arrest and prosecution of indicted war criminals.

The ICTY has grown from a relatively small operation with a 1994 budget of \$11 million to a large international bureaucracy with a 2002-2003 budget of over \$223 million and 1248 staff members.<sup>47</sup> This growth has led to charges of

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<sup>44</sup> ICTY Website, "General Information," 2 May 2003, <<http://www.un.org/icty/glance/keyfig-e.htm>> (May 8, 2003).

<sup>45</sup> One commentator observed that instead of the rhetorical claim that the ICTY would advance the cause of international law and punish criminals, leading states were hoping to get the Balkan crisis "out of the headlines." Samantha Power, *A Problem From Hell: America and the Age of Genocide*, Basic Books, New York, 2002, page 492.

<sup>46</sup> Power Ibid, also Scheffer, pp. 45-46.

<sup>47</sup> Power p. 494 and ICTY Website, General Information. Updated 2 May 2003.

costliness, mismanagement and inefficiency. The international donor community and the United States in particular forced the United Nations to appoint expert review panels and external auditors to provide oversight. Additionally, the United States led the charge to set definitive time limits on the operation of the court in order to force it to streamline its procedures and shorten its tenure.<sup>48</sup>

Politically, the international community has used “conditionality,” as described above, to force Croatia the Republic of Srpska and Yugoslavia and Macedonia to perform certain tasks including judicial reform and cooperation with the ICTY. While this support has not contributed to the effectiveness of the Court, in building capacity, it has ensured that these states have actively cooperated with the ICTY.<sup>49</sup> Militarily, the Western powers leading the NATO/SFOR mission have not used their forces in Bosnia for the systematic round up<sup>50</sup> of indicted war criminals. SFOR has pointed out that the Dayton Accords make the arrest of indictees a “local responsibility” and have balked at pursuing some of the highest ranking and most powerful figures such as Karadzic and Mladic for fear of undermining the peacekeeping mission.<sup>51</sup> This is a clear signal that the international community does not see itself bound by decisions of the Court.

Support for the ICTY in former Yugoslavia communities has also been problematic. War criminals are still at large, often with the complicity of the vast majority of citizens who see many of these figures as war heroes. Until 1999, the ICTY did little to reach out to the local communities. In fact, it was not until early 2000 that UN press releases on the court’s proceedings were even translated into Serbo-Croatian. Now the ICTY has an office in Sarajevo that conducts educational seminars, coordinates visits

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<sup>48</sup> Prosper testimony, Feb 28, 2002.

<sup>49</sup> With conditionality, the international community has held up admission and accession into organizations such as the WTO, the EU and NATO as incentives to make a wide range of reforms in areas from economics to defense and security. Timothy Edmunds, “Defence Reform in Croatia and Yugoslavia, 2002-03,” *Adelphi paper* Draft, p 58.

<sup>50</sup> Daaler, p 143. “IFOR could apprehend those indicted if the opportunity for doing so presented itself during the course of performing its mission.”

<sup>51</sup> For a more detailed account of IFOR and the implementation of the Dayton Accords, please see David S. Yost, *NATO Transformed: The Alliances’ New Role in International Security*, United States Institute of Peace Press, Washington, D.C., 1998, pp. 221-3.

for the court personnel and works with local media to stimulate interest in the tribunal.<sup>52</sup> Since the start of the trials limited televised proceedings have been provided to viewers in the Balkans, but the proceedings in The Hague are not dramatic, they are slow moving and procedurally oriented, remote in time and place, and slowed even more by simultaneous translation.<sup>53</sup> In short, the trials make for bad TV.

Outreach has been a glaring weakness for the court. Some commentators have charged that the ICTY has failed in “delivering believable justice to Balkan societies and encouraging them to critically examine the recent past.”<sup>54</sup> The criminalization of men who are considered patriots without an effective outreach program that explains why the leaders but not the followers are war criminals leads to a sort of “collective guilt” in direct contravention to the norm of individual guilt that the Court is trying to establish.<sup>55</sup> Thus, the outreach failure has contributed to a sense of apathy about the court in the Netherlands and a low level of national support. A 1997 poll revealed that less than 6 per cent of the population in Bosnia saw the prosecution of war criminals as urgent.<sup>56</sup>

Similarly, despite requirements imposed by conditionality, for domestic political reasons, national governments have been disinterested in arresting and extraditing war criminals. For example, in Croatia, the 2002 indictment of suspected war criminal, General Janko Bobetko created a backlash against the ICTY. Up to eighty per cent of the population supported a government decision not to extradite the general and legally challenge the indictment.<sup>57</sup> Moreover, while international conditionality has led to somewhat greater cooperation with the Court, in Serbia, Bosnia and the Republic of Srpska, parties actively opposed to the ICTY have had strong showings in recent elections.<sup>58</sup>

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<sup>52</sup> Power, pp. 496-8.

<sup>53</sup> Robertson, p 380.

<sup>54</sup> *Transitions Online* “A Demanding Justice,” 24-30 September 2002, Lexis-Nexis Database (Lexis-Nexis Current Issues, R227-117), <<http://www.lexis-nexis.com/ciuniv>>, (March 2 2003)

<sup>55</sup> Ibid.

<sup>56</sup> Akhavan, p. 16.

<sup>57</sup> *Transitions Online*, “A Demanding Justice.”

<sup>58</sup> Ibid.

Domestic resistance to the ICTY has, as mentioned earlier, prompted governments in the former Yugoslavia to develop legal capacity in an effort to pre-empt the ICTY. Croatia, Serbia and Bosnia have all taken measures to prosecute war criminals on their own terms. Serbia has even established its own Truth and Reconciliation Commission to investigate the events of the 1990s.<sup>59</sup>

***b. Conclusions***

Overall, the ICTY has proved that “international investigations and prosecutions of persons responsible for serious violations of international humanitarian law are possible and credible.”<sup>60</sup> However, it has not been directly effective in building up the legal or normative capacity by the states of the former Yugoslavia. This imbalance means that the Court has addressed the symptoms of the conflict but has not done its part to assist the former belligerents in building structures, such as the rule of law, that will help the belligerents solve the underlying causes of the conflict.

Moves intended to preempt the Court and to satisfy donor conditionality have affected capacity building, but are unlikely to maintain their strength after the ICTY has finished its work. National and international efforts have been exclusive of the ICTY, only under pressure from an international community fed up with the slow processing of cases in The Hague, the Court has made a more proactive effort to develop local capacity to prosecute international crimes.

Yet outreach programs are still not a priority for the Court. The international community has taken the lead in supporting indigenous efforts as part of a larger post-conflict reconstruction effort and has made cooperation with the ICTY a basis of conditionality for the aid and assistance that these states need to develop and reintegrate into the community of nations. Thus some capacity building has been accomplished despite, not because of, the ICTY.

The ICTY has been most effective in developing a body of international criminal law. Yet the advancements by the ICTY have had little direct impact on the

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<sup>59</sup> Daniel Williams, “A Faint Path to Truth in Serbia: Yugoslav Panel Probing War Lacks Funding, Clout,” *Washington Post*, July, 05, 2002 page A12.

<sup>60</sup> Meron, p. 463.

former Yugoslavia and were unable to prevent the violence that tore into Serbia and Kosovo in 1999, six years after the Court was founded.

Rather than lending political, economic and military support for the purposes of serving the interests of international justice, the international community has used the ICTY as a tool to enforce overall change on the Balkan states. The United States and the EU have used compliance with the Court as a condition for continued economic and military aid as well as the allure of membership in political, economic and military arrangements.

Domestic support for the ICTY in the former Yugoslavia is problematic due to support for indicted war criminals and the desire to preserve sovereignty. The ICTY has failed to actively engage the governments and populations of the region in order to demonstrate that it serves the interests of the people and governments by punishing the individuals who were most responsible for starting and continuing the brutal wars that destroyed their societies.

Yet the ICTY set the stage for other efforts to fulfill the Nuremberg legacy. The case of the ICTY is instructive for present and future tribunals. Its development of law, workings as an international bureaucracy, and experiences, positive and negative, in gaining and maintaining the support of the international community and post-conflict states have foreshadowed the founding of a truly international criminal court as well as its alternatives.

## **2. International Criminal Court (ICC)**

The treaty underlying the International Criminal Court, the Rome Statute, was adopted by the vote of the international community in 1998 and signed and ratified by individual governments over the next four years. The seat of the ICC will be The Hague, Netherlands in the tradition of the ICTY and the International Court of Justice. Currently, the ICC has jurisdiction over states that have ratified the treaty and over individuals who are either citizens of those states (party states) or who have committed international crimes in the territory of a state party. At this writing the ICC has not begun to prosecute individuals even though its temporal jurisdiction took effect on July 1<sup>st</sup> 2002.

As a forum for international criminal justice, the ICC could serve the interests of the international community by promoting an international rule of law that will hold individuals accountable for their actions without allowing them to hide behind sovereignty or sovereign immunity. The ICC could also serve the interests of states by setting standards for the international community in the form of practices and norms. The ICC's complementarity provisions and ability to develop and transfer international norms could force nations to ensure that their judicial institutions meet international standards of due process and fundamental fairness. Thus the ICC could be effective in supporting local capacity building, transferring international legal norms, and developing international criminal law. However, the ICC's limited jurisdictional reach and its focus on punishing past crimes but not enabling states to build deal with future ones is likely to subject the Court to many of the same problems that have plagued the ICTY.

*a. Analysis of Effectiveness*

1. Capacity Building. The ICC is designed to promote local capacity building by means of a threat of usurpation. The Rome Statute uses a concept called complementarity that gives the ICC the discretion to intervene in the domestic affairs of party states when it judges that a state cannot or will not prosecute an offense punishable under the Statute. Thus complementarity is intended to force party states to ensure that their legal systems meet international standards so that the ICC does not usurp jurisdiction. According to Jonathon Charney, complementarity will stimulate states to take action against their citizens because, "[i]n most situations, states find it more desirable to resolve a matter domestically than to surrender responsibility to an international body."<sup>61</sup> However, the mere fact that international norms are available, and complementarity provisions provide incentives to adopt them, means little to states that lack the resources, personnel and capacity to operationalize those concepts.<sup>62</sup>

If there is potential for the ICC to set standards that will transform legal norms in states, there is no indication that the ICC has a formal outreach program to work with states to build capacity to operate under the rule of law. Moreover, states that cannot pursue war criminals today will be equally unable to do so after the ICC has

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<sup>61</sup> Charney, *International Criminal Law*, p. 122.

<sup>62</sup> Kritz, p. 816.

stepped in. Indeed, even as the ICC prosecutes a few leaders, the great bulk of perpetrators, if prosecuted at all, will face whatever national justice system is left in the state whether it adheres to international legal norms or not. In some cases, perpetrators will be able to escape justice because of influence or the threat of violence, but in other cases, the system will simply be incapable of holding everyone accountable. As Neil Kritz, who has written extensively on the rule of law in post-conflict environments has pointed out, “[p]utting all of the hundreds and sometimes thousands of such individuals on trial, whether before a local or international court, would be financially, politically, and logistically untenable.”<sup>63</sup>

Despite the absence of formal capacity building programs, supporters of the ICC have speculated that the complementarity provisions, the incidental experience gained by international staff and the mere existence of an international criminal court will help states develop legal norms that meet international standards. The problem with this assertion is that it is currently only theoretical and the experiences of the ICTs suggest that such an influence may be a long-term project instead of a short-term effect. Like the ICTY, the ICC will treat the symptoms but not the underlying disease.

2. Development of International Criminal Law. Despite the potential issues with capacity building, the ICC, as the first standing international criminal court, has the potential to make continuous progress in the development of international criminal law. Even during the Preparatory Commission meetings developments including the “Elements of Crimes” were introduced which will, for the first time in international criminal law, elaborate the definitions of crimes in the Statute.<sup>64</sup> Thus even before the ICC begins to operate, it has affected the development of international criminal law. Further, once the Court does begin to hear cases and make rulings the case law will carry weight for the state parties and will serve as persuasive authority for others. These rulings and developments will most likely become part of

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<sup>63</sup> Ibid, p. 809.

<sup>64</sup> The International Criminal Court, “Fact Sheet,” United Nations Department of Public Information, December 2002, <<http://www.un.org/News/facts/iccfact.htm>>, (March 2, 2003).



customary international law for states that do not recognize the court now, but make no move to register their objections to rulings.

3. Support for the ICC. The ICC has the support of the majority of the states in the international community. However, its support and therefore ability to be an effective international institution is limited in two key ways. First, the ICC does not have the support of the UN Security Council because two Council members, the United States and China, will not sign on as members. Second, the jurisdiction of the ICC is limited to party states and does not extend to non-party states where international crimes are more likely to take place. Additionally, since the ICC has not opened its proceedings or tested its authority, its support amongst party states and its ability to dictate compliance when it decides to exercise its powers under complementarity remain unknown.

The opposition to the ICC by several states, including the United States, relates to the powers of the ICC vis-à-vis the Security Council. Pursuant to the Rome Statute, the ICC can work with the Security Council, but it does not answer to the Security Council in the exercise of its discretion to investigate, indict or prosecute individuals for international crime. This independence has caused the United States to see the ICC as susceptible to politicization and thus a forum where American military officers and policy makers will be continuously subject to politically motivated complaints. Additionally, the United States sees the Rome Statute, as drawn, as limiting the ability of states to conduct diplomatic affairs.<sup>65</sup>

While legal experts will debate the merits of the United States' assertions, the fact remains that the ICC will not be able to rely on the Security Council or US foreign policy to enforce its decisions. Moreover, the United States has taken active steps under the American Servicemembers Protection Act to ensure that party states to the ICC will not turn American military officers over to the Court in case of indictment for an act that otherwise falls under the Rome Statute.<sup>66</sup>

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<sup>65</sup> Grossman, "American Foreign Policy and the International Court."

<sup>66</sup> American Servicemembers Protections Act, Pub. L. No. 107-206. §§ 2001-2015, 116 Stat. 820, 899-909 (2002).

When the ICC does start formal proceedings, it may also find domestic support problems similar to those found by the ICTY. Complementarity will certainly be a contentious issue and will stimulate resistance as well as capacity building. The lack of a formal outreach program will similarly undermine the ICC's ability to demonstrate that it is trying to serve the interests of the local community while investigating and prosecuting international crimes.

Furthermore, as it stands up and grows into its role as an international institution, the Court will face its own capacity problems. Lessons learned from ICTs show that caseloads, multinational investigations and the management of budgets are always going to be a challenge. Yet instead of focusing on one or several countries like the ICTs currently do, the problems for the ICC will be amplified on a worldwide scale with a multiplicity of languages and a multiplicity of agendas. Procedurally, the ICC will follow the lead of the ICTs in being time consuming, costly, and requiring an ever growing international bureaucracy.

***b. Conclusions***

The ICC will not correct the deficiencies of the ICTs for several reasons. First, while the complementarity provisions may force party states to emulate courts on the international level or those in developed states, an essential element – a capacity building program – is still missing. States parties that lack the capacity to prosecute international crimes will lose jurisdiction to the ICC, but will not be assisted in the development of the needed capacity to carry on further or later prosecutions that meet international standards. Moreover, with jurisdiction over one hundred states, the ICC will not have the capacity to carry out large scale and continuous prosecutions in single states. Second, the lack of an outreach program for capacity building or at least education will limit the ability of the ICC to inform subject populations about the mission of the Court and the important international legal norms that it represents. The ICC will expend on the groundwork laid down by the ICTs in the development of international criminal law. Yet while it has the potential to set new international legal standards and norms, they will only have an indirect influence absent a proactive program of developmental assistance in the judicial sector.

Unfortunately the ICC will not fully serve the interests of the international community and may only partially serve the interests of the state parties. The Rome Conference, by not working with the United States and other major powers members to get a better consensus on the relationship between the ICC and the Security Council sacrificed power for the ideal of global justice. While advocates of the universal justice hope that these powers eventually change their opinion and join the Court, the reality is that the ability of the ICC to have its orders enforced will be circumscribed. Therefore the effectiveness of the Court has been limited before it has had an opportunity to hear its first case. Even when the Court does begin to operate, the absence of capacity building and outreach programs will limit the effectiveness of the institution. For state parties, especially those with low capacity, substandard legal norms, and little tradition with the rule of law, a formal capacity building program would be far superior to the trickle down effect that some advocates of the Court are hoping for.

The ICC envisioned by legalists has not been established. The Court has stood up as an institution with limited jurisdiction and without the membership of three permanent members of the Security Council.<sup>67</sup> Therefore, the institution established to promote the achievement of universal justice lacks the power base needed to effectively carry out its mission making it questionable whether the ICC as it stands fully serves anyone's interests.

### **3. Universal Jurisdiction**

States have used universal jurisdiction to exercise authority over certain crimes (including international crimes) that are so heinous by their nature, that any state has the jurisdiction to open proceedings against an accused even if the accused or the crime in question have no relation to the state that is bringing the action. In 1993 Belgium passed a law that allowed domestic courts to use universal jurisdiction to prosecute crimes against humanity, and genocide.<sup>68</sup> During its early years, human rights advocates and atrocity victims seeking to prosecute perpetrators used this law to indict over twenty-five individuals including seven political figures. Belgium and Switzerland have convicted

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<sup>67</sup> The United States, China and Russia. Russia has signed the Rome Statute but has not ratified it.

<sup>68</sup> Daphne Eviatar, "Debating Belgium's War-Crime Jurisdiction," *New York Times*, January 25, 2003, pp A19-21, Col 1.

some Rwandans for their conduct during the genocide and have indicted others such as Iraqi officials for crimes against their own citizens. Courts in Senegal, Spain and the United Kingdom have also recognized this legal principle. In fact, international movements to establish guidelines for the use of universal jurisdiction have paralleled efforts to establish the ICC.<sup>69</sup>

*a. Analysis of Effectiveness*

1. Capacity Building. Universal jurisdiction is not an institution but a concept. Thus individual states, and more specifically, their court systems can use the concept to pursue international criminals. However, there is neither a coordinating body for universal jurisdiction nor are there programs to build legal capacity in states where the accused are located. The best-case scenario for states with low capacity or lack of political will to prosecute cases is to have some citizens or foreign governments seize upon universal jurisdiction and bring cases in places like Belgium where the courts are sympathetic. Moreover, countries that have universal jurisdiction laws often have proactive human rights organizations that promote adherence to international criminal law.

Even if a state that was applying universal jurisdiction broadly had the full support and cooperation of the international community, its ability to operate and apply universal norms would be limited by the capacity to prosecute all the cases that came from a post-conflict state(s) and by the fact that criminal investigators are still limited by jurisdiction. The practical logistics of trying cases where the actors, crime scenes, victims, witnesses and evidence is far away and often inaccessible limits the use of universal jurisdiction as anything but a last resort for the international community. A “consequence of Belgium’s universal jurisdiction law is that the courts have been

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<sup>69</sup> Navanethem Pillay, “Keynote Address: African Perspectives on Universal Jurisdiction for International Crimes,” Experts Meeting on African Perspectives on Universal Jurisdiction for International Crimes, 18-20 October 2002, Arusha, Tanzania, <<http://www.ictr.org/wwwroot/ENGLISH/speeches/pillay201002.htm>>, (June 12, 2003)

inundated with suits filed by victims of atrocities, who are seeking a forum for redress of their grievances. The potential cost of investigation and litigation of these cases is staggering.”<sup>70</sup>

Belgian prosecutions, the adoption of what are known as the Princeton Principles of Universal Jurisdiction and a high profile case brought by a Spanish judge against the former president of Chile, Augusto Pinochet have served to transfer international norms in the sense that there is an increasing awareness of universal justice among citizens of states where governments and other groups have committed wide scale and systematic violations of international criminal law. The prosecutions and results are often merely symbolic, but there have been several cases where individuals have been brought to justice. However, in those cases the defendants are typically low-level perpetrators who have wandered into the jurisdiction of a state like Belgium or Switzerland, not the persons most responsible for large-scale international crimes.

2. Development of International Criminal Law. Universal jurisdiction has been most successful in the development of international law. The aforementioned Princeton Principles were adopted in 2001 after a yearlong effort by international legal experts trying to establish guidelines for the responsible use of universal jurisdiction as a “potent weapon” against perpetrators.<sup>71</sup> These principles encourage courts to use universal jurisdiction, but only as long as they observe international legal norms such as due process and other safeguards.<sup>72</sup> Belgian and French cases have helped define the limits of sovereign immunity.<sup>73</sup> NGOs have tried to hold states to their treaty obligations (e.g. obligations under the genocide convention) and in cases such as the Pinochet case or the Belgian indictment of Israeli Prime Minister Ariel

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<sup>70</sup> Ibid.

<sup>71</sup> Jeff Milgram, “University Panel Eyes World Crime,” *The Princeton Packet*, July 24, 2001, <<http://www.pacpubserver.com/new/news/7-24-01/crime.html>>, (June 12, 2003)

<sup>72</sup> Eviatar, p A19.

<sup>73</sup> Please see Micaela Frulli, “The ICJ Judgment on the Belgium v. Congo Case (14 February 2002): a Cautious Stand on Immunity from Prosecution for International Crimes,” *German Law Journal*, Vol. 3, No. 3, 1 March 2002, <<http://www.germanlawjournal.com/print.php?id=138>>, (March 12, 2003) and Brigitte Stern, Universal Jurisdiction over Crimes Against Humanity under French Law – Grave Breaches of the Geneva Conventions of 1949- Genocide- Torture- Human Rights Violations in Bosnia and Rwanda,” *American Journal of International Law*, Vol 93, Issue 2 (April 1999) 525-529).

Sharon,<sup>74</sup> domestic courts using universal jurisdiction have been able to get their governments to take actions that the foreign ministries would not have recommended. By using their constitutional powers to force their governments to act, activist judges have expanded the scope and reach of the law.

Due to the limited jurisdiction of the ICC and other special and ad hoc ICTs, universal jurisdiction still has an important role to play in international criminal law. Significantly, these developments have paralleled the creation of the ICC, recognition that international tribunals have distinct limitations and will not always be effective in bringing actions against those most responsible for international crimes.

3. Support for Universal Jurisdiction. Universal jurisdiction can be an effective weapon against war criminals especially when the accused is a low level perpetrator and comes from obscure regimes in the developing world. However, indictments under the Belgian law have caused a political backlash in certain cases when they have been directed against sitting heads of state such as Ariel Sharon or military officers such as American General Tommy Franks. In the past few years, complaints have been lodged against the first President Bush, and American generals Colin Powell, Norman Schwarzkopf, and Franks. As a result, The United States has pressured Belgium to amend its universal jurisdiction law.<sup>75</sup> In response, the Belgian government has made changes that will require complainants to have a direct link between themselves and crimes alleged.<sup>76</sup> This reaction is not just an attempt to mollify an angry hegemon. Politicization has concerned universal jurisdiction advocates who are concerned that the use “against weak and vulnerable countries...can create unenforceable claims and discredit the process.”<sup>77</sup>

Because universal jurisdiction works on a unilateral basis and does not always have the full support of the state whose courts take jurisdiction over a crime,

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<sup>74</sup> Marlise Simons, “Sharon Faces Belgian Trial After Term Ends,” *New York Times*, February 13, 2003, <<http://www.nytimes.com/2003/02/13/international/europe/13BELG.html>>, (February 13, 2003)

<sup>75</sup> *The Economist*, “Belgium’s Genocide Law: Too Embarrassing,” p. 43. See also “Targeting Tommy Franks,” *Washington Times*, May 2, 2003, p. 22 <<http://www.ebird.dtic.mil/May2003/e20030502181987.html>>, (May 2, 2003).

<sup>76</sup> *Economist* “Belgium’s Genocide Law: Too Embarrassing.”

<sup>77</sup> Eviatar, pp A19-21.

the chances that the international community will put its full economic, political and military weight behind an indictment would depend on whether the international community had an interest in arresting the suspect or if in the situation with Pinochet, states are hemmed in by extradition treaty obligations and are forced to take action under their own domestic law.

Like other international criminal justice institutions, universal jurisdiction needs international support to be effective. Universal jurisdiction has no basis to make changes within countries and states that have had their citizens indicted by courts in Belgium have been non-cooperative and outright hostile to the exercise of jurisdiction by those courts. Israel has been critical of Belgium,<sup>78</sup> the Democratic Republic of the Congo has brought a case before the ICJ in response to a Belgian warrant against the sitting Minister of Foreign Affairs,<sup>79</sup> and The United States even threatened the removal of NATO if the underlying law was not changed.<sup>80</sup>

#### ***b. Conclusions***

Universal justice is most effective in developing legal rules and norms that raise awareness of the abuse and impunity that exists in the world. However, universal jurisdiction by itself has no effect on the ability of states to develop a capacity to adopt international legal norms or live under the rule of law.

Overall, universal jurisdiction has assisted the international community in the sense that it has kept the spirit of international criminal law alive in the absence of other forums. It has given victims of abusive regimes and rebel groups an outlet where they can establish their claims on the record for the world to see. Practically, universal jurisdiction is at best a second player to the more recently developed international forums and is particularly susceptible to political maneuvering as the Belgian case demonstrates.

#### **4. Conclusion**

Unilateral international judicial institutions, and universal jurisdiction, described above are consistently effective at developing and strengthening the corpus of international criminal law. The ICTY took an early and aggressive lead to expand the

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<sup>78</sup> Simons.

<sup>79</sup> Frulli.

<sup>80</sup> *Economist*, "Belgium's Genocide Law: Too Embarrassing,"

boundaries of international humanitarian law and human rights law into the area of internal conflict. These gains were incorporated into the Rome Statute of the ICC. Additional advances made during the formation of the Statute capitalized and streamlined a formerly unwieldy body of law. The institution of universal jurisdiction has also contributed to the development of international criminal law by defining the limits of sovereign immunity for state leaders and serving as a last resort for victims of international crimes.

Yet these approaches do not envision a long-term commitment to legal capacity transferring international legal norms to ensure that a post-conflict state would develop and operate pursuant to the rule of law. Recent efforts by the ICTY have recognized the need to incorporate the state level actors, however, this initiative is in response to an overwhelming case load and pressures to clear the docket within the next five years, not a recognition of the essential role that legal capacity building plays in the overall post-conflict reconstruction process. The ICC has failed to grasp this fact, hoping that complementarity will force party states to emulate the structures and norms used by more developed states that operate under the rule of law.

The developments in international criminal law that have been initiated or implemented by these approaches mean that more international criminals will be held accountable for their actions and that impunity is no longer guaranteed. Moreover, the international community has discovered that it can use these developments to enforce cooperation and reform through conditionality. International and domestic courts have already seized upon these advances to force governments and international organizations to respect obligations under international and domestic law. More importantly, developments such as the ICC have caused divisions on the international level that will have affects that go far beyond the prosecution of international crimes.

While support does exist for international criminal justice, the international community as a whole has failed to support the unrestricted use international institutions and the unlimited exercise of universal justice. The reasons lie in the fact that overly legalistic institutions threaten the concept of sovereignty and limit the ability of states and international institutions such as the United Nations (and the Security Council) to conduct international relations and to act in their interests. When these legal tools serve the



interests of major international powers, they can be effective in addressing past abuses and punishing international criminals. However, because they are designed to serve the international community and not the states over which they operate, these institutions are effective at developing international law, but not in building the capacity and transferring the legal norms that the post-conflict states need to grow an indigenous rule of law.

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### **III. MULTILEVEL APPROACHES**

#### **A. INTRODUCTION**

The approaches to post-conflict justice explored in the previous chapters focused on cases where the international community has acted unilaterally. This chapter deals with cases where the international efforts have been supplemented by or combined with national level institutions. The three cases examined here are fundamentally different from each other in practice, but they all share a hybrid character in that state and international level efforts are simultaneously working to address international crimes. This chapter explores the benefits of including state level actors in the post-conflict judicial process and whether the post-conflict judicial institutions can avoid the politicization that helped lead to conflict in the first place, and the tendency to focus on the single-minded pursuit of international criminals without considering the practical effects that the process has on the post-conflict state and the post-conflict reconstruction process and a whole.

#### **B. RWANDA**

##### **1. Introduction**

In Rwanda, three separate post-conflict justice institutions deal with international crimes connected with the genocide in 1994. At the international level, the ICTR, located in Arusha, Tanzania is focused on the prosecution of those most responsible for the genocide. At the state level, the national courts have assumed jurisdiction over more than one hundred thousand genocide suspects that the ICTR will not pursue. Due to obvious capacity problems, the Rwandan government recently revived and adapted a traditional community based process called gacaca, which will process the vast majority of the national level cases. These institutions have a workable, but informal, division of labor but the overall system remains fragmented due to lack of coordination and cooperation between the international and national levels.

The division of labor in the three-pronged approach resulted from default, not design. The Security Council established the ICTR soon after the genocide took place, but it only focused on seventy to eighty high-level officials in the former Rwandese government and other individuals who were deemed most responsible. The new Rwandan

government on the other hand, indicated immediately that it was going to prosecute individuals for their roles in the killings, but because of the large number of offenders, had to categorize the level of responsibility to ensure that certain individuals were tried before the national courts. After several years, the government decided to utilize a modified form of community conflict resolution, called gacaca courts, to process the vast bulk of cases. The ICTR and Rwanda do not have any formal memorandum of understanding that delineates the division of labor, and disputes have arisen over the prosecution of military officers that the current Rwandan government seeks to either protect or prosecute on its own terms.

## **2. International Criminal Tribunal for Rwanda (ICTR)**

The ICTR was established in 1994 in Arusha, Tanzania in the wake of the genocide that claimed over 800,000 lives. Modeled after the ICTY, the ICTR's mandate is more restricted in time and space. Whereas the republics of the former Yugoslavia were still at war, the Rwandan Patriotic Front (RPF) had won a clear victory. Further, unlike Yugoslavia, where national courts were, until recently, unlikely venues for bringing cases against individuals for international crimes, the Rwanda government demanded action against the perpetrators.

Since 1995, the Court has completed only ten trials out of a total of seventy indictments.<sup>81</sup> Set up pursuant to UN Security Council Resolution 955, the ICTR has primary jurisdiction over the commission of acts of genocide committed in Rwanda between January and December 1994. The Court is focused only on bringing those most responsible for the genocide to justice and therefore does not have plans to prosecute many more than the seventy already indicted.

### ***a. Analysis of Effectiveness***

1. Capacity Building. The ICTR has no programs designed to bring Court prosecutors, judges, investigators or administrators together with their Rwandan counterparts in order to build a mentoring relationship. Unlike the case of Yugoslavia, the Rwandans took the initiative and started their prosecutions before the ICTR did. While Arusha's legal capacity in terms of facilities, resources and experienced personnel far

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<sup>81</sup> ICTR Website, "Achievements of the ICTR," undated, <<http://www.ictr.org/wwwroot/ENGLISH/geninfo/achieve.htm>>, (May 22, 2003)

exceeds that of Rwanda's courts, the ICTR has not instituted any bilateral programs or lobbied the international community designed to encourage the Rwandan courts to emulate the international tribunals or the courts systems of more advanced democracies. In fact, the Court has passed on proposals to hold some proceedings in Kigali, the Rwandan capital that would serve as a model for Rwandan jurists.

If at all, the ICTR has tried to infuse international norms into the post-conflict judicial process in only a general way by setting an example of how to conduct tribunals that adhere to principles of fairness and due process. However, because the ICTR is remote to Rwandans in terms of distance and relevant connections to justice, the transfer of international norms from the court to Rwanda has been minimal. Even then, the example being set is ambiguous because the trials have moved at an extremely slow pace, the accused have been treated to a standard of living in detention that most Rwandans would envy and witnesses have not been afforded adequate protection after testifying. Moreover, almost nine years after the crimes took place the ICTR still does not have an effective outreach program to engage the citizens of Rwanda who are the victims, witnesses and perpetrators of the crimes being prosecuted in Arusha.<sup>82</sup>

2. Development of International Criminal Law. Despite its slow progress, the ICTR has made some important advances in international criminal law. Significantly, the ICTR can claim the first conviction for genocide, the first conviction of a state official for genocide and the establishment of rape as a method of genocide.<sup>83</sup> Additionally, the rules of procedure for the Court have been adopted as the basis for the rules that will be used by the Special Court in Sierra Leone. However, the ICTR is also providing negative lessons for future unilateral or mixed international tribunals due to its slow progress and inability to engage supporters on the international and post-conflict state levels.

3. Support for the ICTR. International support for the Court is largely rhetorical and moral. Notwithstanding its roots, the ICTR is not effectively supported or utilized by the UNSC or its members who seem to have interests in Central

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<sup>82</sup> Africa Rights, "Rwanda; New Appointment at the ICTR: An Opportunity to Mend Fences," *Africa News*, February 27, 2003, <<http://web.lexis-nexis.com>>, (May 24, 2003).

<sup>83</sup> Charles Mironko, "Gacaca: A Critical Analysis," Unpublished, Paper presented at 41<sup>st</sup> ASA Annual Conference, Washington, D.C. 2002, p. 14. Used with permission of author.

Africa. Moreover, with its slow progress, especially as compared to the under-resourced national courts, many in the international community and in Rwanda see the ICTR as mismanaged, corrupt and a waste of money. Indeed, the ICTR has failed to process its caseload efficiently. The international community, Security Council members in particular, has taken issue with the lack of progress and mismanagement that have plagued the court over the past nine years. The United States has been one of the strongest critics of the court and one of the loudest voices in urging the ICTR to finish its trial work by 2008.<sup>84</sup>

These same voices have urged Rwanda to cooperate with the Court but thus far, have not used the conditionality that was crucial to success in the former Yugoslav republics. There are several reasons why this may be the case. First, there is a residual guilt complex by countries that failed to intervene in the genocide. Therefore, the Rwandan government claims a moral position that has been difficult to assail. Second, the Rwandan government has been remarkably strong, stable, and even somewhat liberal at times since 1994, three characteristics that are rarely found in Central African governments. Consequently, the onus has been on the ICTR to establish a cooperative relationship with Rwanda, not the other way around.

Ambassador Prosper, himself a former prosecutor for the ICTR, has called on the Court to establish “clear guidelines” with the Rwandan government relating to the division of labor between the two levels. The US position has been that it and other nations would continue to provide resources including the extradition of wanted persons located within their territory to the court. However, he stressed the need for the ICTR to improve management of the court and increase the pace of trials.<sup>85</sup>

Significantly, the international community has not forced the Rwandan government to cooperate with the ICTR through conditionality, nor has it used

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<sup>84</sup> Africa Rights, “Rwanda; New Appointment at the ICTR: An Opportunity to Mend Fences,” *Africa News*, February 27, 2003, <<http://web.lexis-nexis.com>>, (May 24, 2003). This NGO has urged the new Deputy-Prosecutor Bongani Majola and eleven new judges to take this opportunity to work more closely with the Rwandan government and genocide survivor groups as part of an overall plan to become more effective at trying cases and providing outreach to Rwandans. Other nations have seen fit to pre-empt the ICTR in its search for justice. In fact, in addition to the large number of cases that Rwanda has already prosecuted, Belgium and Switzerland have used universal jurisdiction to convict genocide suspects located in their countries.

<sup>85</sup> Prosper, Dec 2001.

the ICTR actively to deter conduct by the Rwandan and other regional governments in the Democratic Republic of the Congo by expanding its mandate. In fact, the limited mandate itself indicates a relatively low level of international support. The former issue may be linked to the Court's institutional problems and a need to support the Tutsi led government in Kigali. The latter issue may be related to the reluctance of the Security Council to give another ICT an open mandate in terms of time and money.

ICTR itself suffers from capacity problems. It is historically short of resources and has a high turnover rate for personnel. More importantly, the ICTR also lacks the capacity to connect with the Rwandan people in a way that allows it to be a meaningful expression of international justice for them. Several reasons stand out: first, the location of the court in Arusha essentially means that international justice is foreign justice; second, the accused and defense attorneys in Arusha live much better than the vast majority of Rwandans and seem to be soaking up funds that Rwandans think could be better spent on them; third, ICTR has done little in the way of public relations and outreach; finally, ICTR staff members and investigators have shown a high degree of insensitivity and lack of cultural awareness while dealing with the victims of the genocide.<sup>86</sup> In fact, some ICTR staff see themselves as serving the international community as a whole instead of the people of Rwanda.

A key area of contention between Rwanda and the ICTR is the prosecution of Rwandan Patriotic Army (RPA) leaders for their conduct during the offensive that stopped the genocide. Allegations of international crimes against these individuals have led to six indictments by the ICTR, but the Rwandan government insists that the ICTR should only prosecute genocide cases and leave cases related to the RPF/RPA to domestic jurisdiction. The issue came to a head in mid 2002 when the ICTR

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<sup>86</sup> Hans S. Nichols, "U.N. Court Makes Legal Mischief," *Insight On The News*, December 23, 2003, ([www.insightmag.com](http://www.insightmag.com)) found on No Peace Without Justice, <<http://www.npwj.org>>, (May 22, 2003). Some of the ICTR prosecutors see themselves as promoting international or universal justice rather than addressing the crimes that took place in Rwanda. Several investigators working for the ICTR have also been arrested and charged with participation in the genocide itself. This has exacerbated an already tense relationship between the court and Rwandans. Africa Rights, "Rwanda; New Appointment at the ICTR: An Opportunity to Mend Fences," *Africa News*, February 27, 2003, <<http://web.lexis-nexis.com>>, (May 24, 2003).

complained to the Security Council that the dispute had led to non-cooperation from Rwanda in the areas of witness and documentary production.<sup>87</sup>

***b. Conclusions***

The ICTR has been ineffective in building judicial capacity or transferring international norms to Rwanda because it is more focused on prosecuting a limited number of individuals and helping to develop international criminal law. There has never been an effort made to integrate the Court into a post-conflict reconciliation process, or build capacity. As for the transfer of international norms, the ICTR is located hundreds of miles away, but has no outreach program to inform Rwandans about the important work being done in Arusha. The Court has made some contributions to the development of international criminal law, but those developments have not improved the ability or capacity of Rwanda to implement post-conflict justice.

The ICTR has been ineffective in building the capacity of the Rwandan judicial system and transferring norms of international legal practice to the indigenous legal system. Instead, it has left those tasks to other members of the international community, while focusing on developing international law. The divergence between the aims of the international tribunal and the national government has hurt the overall post-conflict justice and reconciliation effort. With proper coordination, the ICTR could be a positive influence on the national courts, gacaca and possibly the Rwandan government itself. Yet instead of acting as a mentor, the ICTR has taken on the role of an adversary.<sup>88</sup> The international community has focused on clearing the remaining caseloads and urging the ICTR to work with Rwanda, not on supporting the primacy of the Court or making it more effective in helping Rwandans. Rwandan support for the ICTR is slim and at this point, the international community is not willing to force compliance with the Court. This lack of support is a direct result of the ICTR's failure to engage the victims of the genocide and support a long-term post-conflict justice and reconciliation program.

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<sup>87</sup> Human Rights Watch, "Action Urged Regarding Non-Cooperation with ICTR and ICTY: Letter to Security Council Members," New York, October 25, 2002, <<http://www.hrw.org/press/2002/10/noncooperation-ltr.htm>>, (May 22, 2003).

<sup>88</sup> Olivier Dubois, "Rwanda's National Criminal Courts and the International Tribunal," *International Review of the Red Cross*, No. 321, 31 December 1997. <<http://www.icrc.org>>, (November 2, 2002). "The international community and the Tribunal appear to have missed some opportunities which might have made for closer harmony between national and international justice without fundamentally calling into question the Tribunal's impartiality and efficiency."



The ICTR has failed to transfer international norms of post-conflict justice and reconciliation, help build local legal capacity and infuse international law into the operations of the post-conflict judicial institutions at work in Rwanda. The main reasons for this situation is because Rwanda took the early lead in prosecutions, using assistance that will be detailed below, the Court did not make capacity building an objective and the international community has not used conditionality to force Rwanda to emulate the ICTR. While it has had some successes in developing the law and has worked to achieve justice in some cases, it has fallen short of turning itself into a model of how an ICT (or even ICC) could effectively work with judicial institutions in post-conflict states. In fact, the lessons for future ICTs are generally negative.

The ICTR has failed partly because it has not gained or maintained real international or national support. The failure to gain and maintain real international support stems from its slow progress and poor administration, which in turn led the international community to limit the mandate to Rwanda in order to avoid an open-ended institution in Central Africa. The consequence is that the Court has not been able to impose its will on Rwanda and has not acted as a deterrent to violence in that region since 1994. The failure to gain support with Rwandese flows from a focus on prosecuting a limited number of international crimes to the exclusion of the needs and concerns of the people of Rwanda. This alienation has led to misunderstandings between the ICTR and Rwandese and perceptions that post-conflict justice is not being carried out in their interests.

### **3. National Courts**

Rwanda's national courts have a broader scope than the ICTR seeking to punish acts of genocide from 1990 through 1994. The Rwandan genocide law is codified under Organic Law no. 08/96 on the Organization and Prosecutions for Offenses Constituting Genocide or Crimes Against Humanity Committed since October 1, 1990.<sup>89</sup> Under the law there are four categories of accused, with those in category one, which numbers over 2,000 considered to have been the leaders and most culpable for the genocide. "Category One consists of genocide planners, organizers, supervisors and rape offenders including sexual torture. Category Two includes instigators and perpetrators of serious attacks with

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<sup>89</sup> Mironko, p. 8.

intention to kill. Category Three consists of accomplices in serious crimes (short of rape and murder) without intention to kill. Category Four consists of those who looted and/or destroyed property.”<sup>90</sup> Since national level prosecutions started in 1996, the special chambers, created within the national courts have processed hundreds of cases.<sup>91</sup> However, these courts are hamstrung by capacity problems, are subject to political influence and have not consistently maintained international standards of fairness and due process.

*a. Analysis of Effectiveness*

1. Capacity Building. As previously noted, Rwandan courts had to rebuild from scratch after the genocide in 1994. When the trials began in 1996, international efforts in the form of funding and experienced lawyers helped strengthen the capacity of the Rwandan courts to conduct proceedings that worked to comply with international standards. In fact, the capacity building efforts mandated by the need to prosecute thousands of genocide suspects have done more to rehabilitate the judicial system than anything else, including the ICTR. Although adherence to international standards continues to be a problem, the courts are continuously increasing their efforts to observe those norms.<sup>92</sup> Individual donor countries and NGOs have taken the initiative to work with the Rwandan criminal justice system to ensure that it develops the capacity to work effectively and within the bounds of internationally accepted standards.

Unfortunately, huge caseloads and lack of resources and trained personnel means that abuses and shortcomings still occur throughout the system. Instances of corruption, politicization, and lack of judicial independence have underscored the fact that the Rwandan courts still lack the norms required for consistent and sustained effectiveness under the rule of law.<sup>93</sup> Yet, the courts in particular, have made progress as prosecutors, judges and other members of the criminal justice system become more habituated to the system and gain more experience. Efforts are continuous.

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<sup>90</sup> Ibid.

<sup>91</sup> Jennifer Widner, “Courts and Democracy in Postconflict Transitions: A Social Scientist’s Perspective on the African Case,” *American Journal of International Law*, Vol 95, Issue 1 (Jan., 2001), 64-75, 67.

<sup>92</sup> Ibid.

<sup>93</sup> Mironko, p. 11. See also Akhavan, p. 24.

As late as March of 2002, the donor community was still sponsoring workshops in Kigali on topics such as judicial independence and ethics, court administration, and legal training.<sup>94</sup>

The Rwandan system is working to comply with international law, but lack of training and experience on the investigative, prosecutorial, defense and judiciary means that international legal norms are not being fully observed. Still, the independent international efforts to bolster the capacity of these courts mean that the Rwandan courts are continuously increasing the capacity to be able to meet universal standards. However, because of the hundreds of thousands of individuals who have been detained on genocide charges, it would take the Rwanda courts over four hundred years to prosecute all of the cases. This lack of capacity has led the adaptation of *gacaca*, a traditional grass roots level conflict resolution, to process the large number of cases. In turn, the use of *gacaca* has meant given the Rwandan courts the necessary breathing space needed to develop indigenous legal capacity that can effectively apply the rule of law.

2. Development of International Criminal Law. The Rwandan national courts have not made any contribution to the body of international law. Genocide prosecutions have been conducted pursuant to domestic law, not the legal mechanisms designed for Arusha. Yet the fact that Rwanda was able to develop a judicial capacity and begin prosecutions that continuously worked to comply with international legal norms can be viewed as an important precedent for future post-conflict states.

3. Support for National Courts. National courts in Rwanda enjoy clear international support. For example, donors such as the United States believe that support to these courts is necessary to resolve the large number of genocide cases, therefore it and other international donors have supported the capacity building efforts through rule of law programs. France, Belgium, Canada, and the United States all have assistance programs operating in Kigali.<sup>95</sup>

Rwandans also recognize the need to establish accountability for the genocide. In fact, many Rwandans want their own courts to have the primary role in

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<sup>94</sup> Mironko, p. 13.

<sup>95</sup> Widner, p. 68.

prosecuting genocide cases. Even perpetrators who are sitting in prisons are in favor of a speedy and fair judicial process “so that those who are guilty can be punished and those who are innocent can be freed and have their names cleared.”<sup>96</sup> They are willing to support the national courts and the gacaca system in order to put the genocide behind them and resolve the thousands of cases that remain. The government itself wants to resolve the cases in order to get through the backlog of outstanding cases and ease overcrowded prison conditions. Thus, national courts have attracted significant national and international support. The continued efforts by the national government, NGOs, and the donor communities to improve the quality of the judicial system provides a favorable indication that support for the judicial system will be sustained after the genocide cases are cleared and that the courts will operate pursuant to the rule of law.

***b. Conclusions***

The inherent lack of experience and resources combined with the overwhelming number of cases means that the Rwandan Courts will not be able to effectively develop capacity and a tradition of compliance with the rule of law without the continued and sustained efforts of the Rwandan government and the international community. Capacity in this case focuses on prosecuting the genocide cases and having the residual capacity to operate effectively according to international legal norms. It does not mean the capacity to prosecute over one hundred thousand cases. Yet the international community has to continue to deliver support in the form of money and technical assistance indefinitely in order to ensure an effective and independent judicial system that complies with international legal norms. National support is there and will continue to grow as the national courts demonstrate that they can deliver fair justice instead of ethnically driven decisions. Currently, the national courts are working within their capacity due to the existence of gacaca, which has given these courts the vital space needed to establish themselves.

**4. Gacaca**

Despite a greater ability to process cases than the ICTR, by May of 1998 Rwanda realized that it needed an alternate mechanism to deal with the extraordinary overload resulting from the detention of so many genocide suspects. The mechanism selected was

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<sup>96</sup> Mironko, p. 12.

gacaca. Gacaca had traditionally been used at the village level to settle minor disputes, but had been on the wane in the decades prior to the genocide. After the genocide, administrative gacaca was revived to help settle village level conflicts due to the lack of legal capacity. The objectives of genocide gacaca in this instance are: to establish the truth of what happened during the genocide; to speed up genocide trials; to eradicate the culture of impunity; and to reconstruct Rwandan society.<sup>97</sup> The project took off in 2001 when Rwandans elected over 200,000 judges to sit in over 9000 gacaca courts nationwide. Pilot programs were conducted throughout 2002 and received favorable support. The remaining gacaca courts are starting to operate nationwide.<sup>98</sup> Gacaca will not be used to prosecute Category One offenders, however it will deal with category 2, which includes acts that would be punishable under international criminal law. Thus in addition to the ICTR and national courts, gacaca will deal directly with international crimes.

*a. Analysis of Effectiveness*

1. Capacity Building. Gacaca does not build legal capacity in Rwanda or transfer international legal norms. Instead, gacaca is a response and a solution to the extraordinary, but temporary, capacity problems facing the Rwandan courts. The ambitious program has the potential to process all the genocide cases in only a few years compared with the estimated one to four hundred years that it would take the domestic courts to carry out their mandate.<sup>99</sup> The government has already released over 40,000 prisoners to their villages who will live in their communities until the gacaca courts can resolve their cases.<sup>100</sup> However, international standards will be hard to implement and maintain because of the informal nature of the forum and the lack of education amongst the more than 200,000 gacaca judges. Once the genocide cases have been resolved, Rwanda will have a more advanced form of a traditional community based conflict resolution mechanism.

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<sup>97</sup> Ibid., pp. 28-29.

<sup>98</sup> Carter Dougherty, "Rwanda Widens Effort to Heal War Wounds: Genocide suspects Judged by Peers in Village Courts," *Washington Times*, April 24, 2003. <<http://www.lexis-nexis.com/universe>>, (May 23, 2003)

<sup>99</sup> Widner, p. 67.

<sup>100</sup>, Associated Press, "40,000 Prisoners to be Released, Including Genocide Suspects," *No Peace Without Justice*, January 8, 2003, <<http://www.npwj.org>>, (May 22, 2003)

The gacaca system does not adhere to international legal norms, but NGOs and the international community are willing to overlook most deficiencies if certain minimal standards are met and human rights are protected.<sup>101</sup> There is a consensus that the gacaca system does not meet international standards, but human rights groups have demanded improvements to the system, not the abolishment of gacaca.<sup>102</sup> However, the outcry over the lack of adherence to international standards is tempered by the recognition that gacaca is the only way that Rwanda will be able to conduct proceedings against suspected perpetrators, bring a sense of justice to the communities, alleviate overcrowded prison conditions and help set Rwanda society on the road to reconciliation and beyond.

2. Development of International Criminal Law. As a national institution that has been criticized for its lack of adherence to international legal norms, gacaca does not contribute to the development of international law in the same way as ICTs or the ICC. However, gacaca does present the international community with an example of community based conflict resolution that can augment other judicial efforts at the international and national levels. The gacaca example is valuable to the international legal community because it shows that traditional conflict resolution institutions can foster community reconciliation and punish low-level offenders while offering minimal standards of international criminal law.

3. Support for Gacaca. Despite some reservations, the international community has financially supported the gacaca because it is the only feasible way to process the one hundred thousand plus cases against genocide defendants. The support is subject to some specific concerns regarding the rights of the accused and the perception that the gacaca system will be viewed as victor's justice. However, gacaca is seen as essential for the post-conflict justice process and the reconciliation of Rwandan society.

In Rwanda, the transfer of the bulk of the genocide cases over to the gacaca system has been positively received. In a survey conducted during the pilot phase of the program in 2002, "about 92 percent of the general population find Gacaca as

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<sup>101</sup> Amnesty International, "Rwanda: Gacaca – Gambling with Justice," Amnesty International, June 19, 2003, LexisNexis Current Issues Universe, (A360-81), <<http://www.lexisnexis.com/ciuniv>>, (Mar 2, 2003).

<sup>102</sup> Mironko, pp. 30-31.

a viable remedy to the culture of impunity, a mediation and reconciliation tool, as well as a key to a new phase in country-wide development.”<sup>103</sup> Yet, while members of the Hutu ethnic group, which makes up most of the population, support the gacaca courts as a means of returning to normalcy, they generally feel that the system treats them differently from the minority Tutsi. Gacaca courts will not try cases where Hutus were killed by the RPA during its offensive. These complaints are raised at gacaca meetings, but officials insist that only normal courts can handle such crimes.<sup>104</sup>

**b. Conclusions**

Gacaca is an imperfect solution to the capacity problems facing Rwandan courts, yet it has become an essential and potentially effective component of post-conflict justice and reconciliation in Rwanda. Both the international community and Rwandans are willing to overlook flaws in the gacaca system because there is no other viable alternative to establishing truth and accountability for the 1994 genocide. Moreover, the gacaca system may serve as an example of traditional conflict resolution or alternate dispute resolution that can be used in other post-conflict environments as an augment to judicial systems with low capacity.

**5. Conclusion**

The three-pronged approach that has resulted in Rwanda has worked in spite of itself for several reasons. First, despite the flaws in each prong, capacity building is taking place at the national level that promises to infuse the international legal norms that will allow Rwanda to effectively operate under the rule of law. Although there are some problems, the national courts are operating, they are holding genocide perpetrators accountable and they are continuously working to improve their performance. Moreover, the ICTR has made developments in international criminal law and the gacaca courts have demonstrated that it is possible to hold large numbers of perpetrators accountable for their actions even in the face of huge capacity shortfalls.

Yet, the Rwanda approach would be much more effective if it was integrated. Cooperation and coordination between the ICTR and the Rwandan government would

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<sup>103</sup> *Xinhua General News Service*, “Rwandans’ Participation in Gacaca Courts to be High: Survey,” March 6, 2003, <<http://www.lexis-nexis.com/universe>>, (May 23, 2003)

<sup>104</sup> *The Economist*, “On a Patch of Grass,” U.S. Edition, May 17, 2003. <<http://www.lexis-nexis.com/universe>>, (May 23, 2003)

give the international and national components a larger stake in the eventual outcome and ensure that the accused were accorded the same treatment. Moreover a joint enterprise would allow the Rwandans to see the process take place in a way that included them and allow the ICTR to exercise a mentoring influence over the government and courts in Rwanda. A more integrated approach would also make it easier for the international community to use the ICTR as an instrument to promote cooperation and the rule of law within Rwanda and in other parts of Central Africa that still suffer from the conditions that led to the 1994 genocide. By not integrating the ICTR has lost opportunities to get better cooperation from witnesses and has allowed a perception to grow that money spent on the Court in Arusha is denying Rwandans of funds and resources that could be used more effectively in Rwanda.

### **C. EAST TIMOR**

In 1999, the population of East Timor voted to secede from Indonesia in a U.N. sponsored plebiscite. During the violence that followed, the physical infrastructure of East Timor was destroyed and thousands of people killed. After the violence had subsided Indonesian troops and militias that had committed international crimes pulled back to West Timor. Peacekeepers, relief workers and UN personnel found that the capacity of the new quasi –state was in utter ruins with no ability to bring those individuals to justice.

Pursuant to UN Security Council Resolution 1272, the United Nations Mission in East Timor (UNTAET) was formed to take over executive, legislative and judicial functions for the failed state. Included in the new judicial scheme were four district courts and a court of appeals. Within the Dili District Court system there are two Special Panels consisting of both East Timorese and international judges that have exclusive jurisdiction over international crimes committed in East Timor between January 1 and October 25, 1999.<sup>105</sup> By December 2002, the Special Panels had indicted over 140 and had convicted thirty-one individuals for their commission of international crimes in 1999.<sup>106</sup>

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<sup>105</sup> Human Rights Watch, “Justice Denied For East Timor: Indonesia’s Sham Prosecutions, the Need to Strengthen the Trial Process in East Timor, and the Imperative of U.N. Action,” New York, 2002, <<http://www.hrw.org/backgrounder/asia/timor/etimor1202bg.htm>>, (February 27, 2003)

<sup>106</sup> Ibid.



UNTAET and the Special Panels will be examined together as a model of a mixed tribunal. Since UNTAET has stood in as the sovereign and its subordinate organ the Special Panels is the venue for the prosecution of international crimes, they can be considered to be working on both the international and national levels. As a post-conflict justice institution, the Special Panels have international experts and judges working within the domestic legal system with East Timorese lawyers and judges. The Panels have been recruiting, educating and training these East Timorese to eventually replace all international personnel currently assigned there.

Overall, the Special Panels have shown themselves to be an effective model for post-conflict justice that has been able to set up a functioning system to address violations of international criminal law. From the start UNTAET recognized the need for local lawyers who could serve as prosecutors, judges and defense attorneys. Special care was taken to legitimize and take away all political implications of prosecutorial and judicial appointments. A five-member commission, with East Timorese membership, was established to vet potential jurists.<sup>107</sup> However, identifying those who had qualifications was a difficult task because “Under Indonesian rule, no East Timorese had been appointed to judicial or prosecutorial office.” The few lawyers who remained lacked any relevant experience with the administration of justice or the practical application of the criminal law.<sup>108</sup>

Selection judges and prosecutors were sworn in by January 2000. Further appointments have followed and UNTAET has implemented a three tiered training program that goes beyond technical and practical skills and fosters an appreciation of the crucial role of the judiciary in society and the benefits of a culture of law. This last point is especially important in East Timor, a “society that had never before experienced respect for the rule of law, and in which the law was widely perceived as yet another

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<sup>107</sup> Hansjorg Strohmeyer, “Collapse and Reconstruction of a Judicial System: The United Nations in Kosovo and East Timor,” *American Journal of International Law*, Volume 95, Issue 1, (January 2001) 46-63, 52.

<sup>108</sup> Ibid., p. 50, 53. At the time UNTAET started in 1999, fewer than ten lawyers were believed to remain in country and they were believed to be so inexperienced as to be unequal to the task of rebuilding judicial capacity in East Timor.

instrument for wielding authority and control over the individual, the meaning of independence and impartiality of the judiciary had to be imparted gradually.”<sup>109</sup>

## **1. Analysis of Effectiveness**

### ***a. Capacity Building***

When the Indonesian authorities departed all the administrative and political cadres left as well. Therefore, UNTAET was not faced with an entrenched elite whose interests would potentially clash with the UN transitional authorities. High on UNTAET’s list of tasks was establishing law and order in order to provide security for the East Timorese and to collect evidence of past crimes.<sup>110</sup>

UNTAET’s efforts to develop laws, lawyers, and institutions have been matched by progress in reestablishing public administration, the police and the formation of the armed forces.<sup>111</sup> Long-term challenges for UNTAET and its successor United Nations Mission of Support in East Timor (UNMISET) include ensuring that capacity is strengthened and sustained even after the projected stand down of UNMISET and its Special Crimes Investigations Unit (SCIU).<sup>112</sup>

In the selection of indigenous legal experts, special care was taken to legitimize and take away all political implications of prosecutorial and judicial appointments. In order to avoid accusations of favoritism, “the establishment of [an] independent judicial commission became the primary mechanism for the selection of judges and prosecutors and served as an important safeguard for the establishment of an independent and impartial judiciary.”<sup>113</sup> The five-member commission was headed by an East Timorese and included two international legal experts. However, identifying those who had qualifications was a difficult task because the mass exodus of Indonesians had stripped East Timor of judges, prosecutors, and law clerks. <sup>114</sup>

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<sup>109</sup> Ibid., p. 55.

<sup>110</sup> Ibid., p. 47.

<sup>111</sup> United Nations, “Special Report of the Secretary-General on the United Nations Mission of Support in East Timor,” S/2003/243, 3 March 2003, p. 1.

<sup>112</sup> Human Rights Watch, “Justice Denied For East Timor.” Note that UNMISET may be extended for an additional year.

<sup>113</sup> Strohmeyer, p. 52.

<sup>114</sup> Ibid., p. 50, 53. At the time UNTAET started in 1999, fewer than ten lawyers were believed to remain in country and they were believed to be so inexperienced as to be unequal to the task of rebuilding judicial capacity in East Timor.

The commission used a rigorous interview and selection process to identify judges and prosecutors who were sworn in by January 2000. Further appointments have followed and UNTAET has implemented an aggressive three tiered training program that goes beyond technical and practical skills and fosters an appreciation of the crucial role of the judiciary in society and the benefits of a culture of law. This last point is crucial because since East Timor was a “society that had never before experienced respect for the rule of law, and in which the law was widely perceived as yet another instrument for wielding authority and control over the individual, the meaning of independence and impartiality of the judiciary had to be imparted gradually.”<sup>115</sup>

The indigenous legal community still lacks education, training, and experience. Specific problems with the Special Panels include: insufficient numbers of trial judges and a non-functioning court of appeals; inadequate trial transcripts and translation services; lack of support services and resources for judges; inadequate professional training for the judiciary; and a need for added resources and qualified personnel for the defense bar.<sup>116</sup> Moreover, detainees and accused have had their rights infringed upon because of a lack of lawyers, facilities and adherence to international human rights standards.<sup>117</sup> These shortcomings are unsurprising given the relatively short time that these institutions have been operating, the remote location of East Timor for international legal experts, and the difficulty of keeping the international community focused on the needs of a post-conflict state once attention is shifted to a new crisis or region.

Yet, UNTAET’s monopoly over the legal system and its domination of the Special Panels has greatly facilitated the transfer of international legal norms to the East Timorese legal and judicial systems. UNTAET accomplished this task three ways. First, it developed a legal framework based on both local norms and international law. Second, it identified and trained individuals to work with, and eventually take over, the system. Finally, in a situation reminiscent of *gacaca* in Rwanda, UNTAET set up an independent truth commission to facilitate reconciliation and help ease the burden of cases facing the

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<sup>115</sup> Ibid, p. 55.

<sup>116</sup> Human Rights Watch, “Justice Denied For East Timor.”

<sup>117</sup> Amnesty International, “East Timor: Justice at Risk,” July 27, 2001, LexisNexis database (Current Issues Universe, A360-50), <<http://www.lexisnexis.com/ciuniv>>, (March 2, 2003)

embryonic legal system.<sup>118</sup> Established over a year after the Special Panels, the Commission for Reception, Truth and Reconciliation in East Timor has been vested with a mandate to establish the truth regarding the commission of human rights abuses and may grant immunity from prosecution for specific categories of crimes, although not for international crimes.<sup>119</sup>

***b. Development of International Criminal Law***

The Special Panels are helping to develop international law in two ways. First, the Special Panels demonstrate that the United Nations can successfully take direct control of a state's judicial system in order to develop indigenous capacity and to prosecute international crimes.<sup>120</sup> Second, the Special Panels have set a precedent by using the Rome Statute in place of an organic legal system.<sup>121</sup> The practical lessons learned from putting the statute into practice will be invaluable when the ICC begins to hear cases. The Special Panel's process of interpreting rules and flushing out the mechanics of the Statute will provide the ICC with a valuable preview of issues that will have to be addressed to make the proceedings more effective.

***c. Support for Special Panels***

International support for the UNMISSET mission and the Special Panels has been consistent, but is not as high as the United Nations suggests. As the Secretary-General noted in his recent report, the international community must maintain its political support and do more to provide resources to the entire post-conflict peace-building effort, specifically including the security sector.<sup>122</sup> The reality is that East Timor's remoteness and proximity to the most populous Muslim nation make the support more rhetorical than actual. Throughout its mandate the UN mission "has suffered from a combination of inadequate resources, a shortage of experienced staff, poor management, and a lack of

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<sup>118</sup> Strohmeier, pp. 58-59. This process also took place in Kosovo, where it proved to be much more difficult legally and politically to implement. In East Timor, legal experts had to choose their language carefully so as not to retroactively legitimate the Indonesian occupation of East Timor.

<sup>119</sup> Stahn, "United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?" pp. 200-01.

<sup>120</sup> This was also accomplished in Kosovo, which falls within the jurisdiction of the ICTY.

<sup>121</sup> No Peace Without Justice, "Justice for East Timor- 15 May Report," The practical problems of implementing the ICC law were difficult due to the overall poverty of the court system and the lack of familiarity of local and some international lawyers with the new, untested, international legal code.

<sup>122</sup> United Nations, "Special Report of the Secretary-General on the United Nations Mission of Support in East Timor," pp. 8-9.

political support.”<sup>123</sup> Planned phasing out of the SCIU – the international investigative unit - before most of the cases are heard will hamper the ability of the Special Panels to ensure that post-conflict justice is conducted appropriately.

UN support for Special Panels prosecutions against Indonesian officers has created an interesting situation between the international organization and the new East Timorese government. The government feels that it has to look past the UN mission and strike a balance between calling Indonesians to account for their crimes and building regional relationships. East Timorese officials have indicated that they see the relationship with Indonesia as too important to be derailed by international criminal issues.<sup>124</sup> Yet, UNMISSET appears to be willing to press cases<sup>125</sup> and has charged seven Indonesian including the former armed forces chief with international crimes.<sup>126</sup>

Nationally, support for the Special Panels remains high, but there is a growing sense of injustice for victims and for defendants at the Special Panels who were essentially just small actors in the atrocities.<sup>127</sup> In Indonesia, sham courts and an amnesty law in safely shelter the individuals who are most responsible for the 1999 atrocities.<sup>128</sup> Moreover, the justice system in Dili seems to have been compromised in some cases by politically connected East Timorese who have been able to avoid prosecution for international crimes.<sup>129</sup>

## **2. Conclusions**

The Special Panels have been effective at building legal capacity in East Timor that is integrated into the overall post-conflict reconstruction process. Although the legal

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<sup>123</sup> Amnesty International, “East Timor: Justice at Risk,”

<sup>124</sup> Shawn Donnan and Hilda Hildayat, “Indonesia Jails Former Head of Military in East Timor,” *Financial Times*, London, USA Edition 2, March 13, 2003. p. 9.

<sup>125</sup> No Peace Without Justice, “Justice for East Timor- 15 May Report,”

<sup>126</sup> Jerry Norton, “UN Brings Charges over East Timor,” *Birmingham Post*, February 26, 2003 p. 9. <<http://web.lexis-nexis.com/universe/document?-m=51cc701a4cdcb5c59f3cfab33bda866d...>>, (May 22, 2003)

<sup>127</sup> No Peace Without Justice, “Justice for East Timor- 15 May Report,”

<sup>128</sup> Human Rights Watch, “Justice Denied For East Timor. “This has lead to widespread cynicism among the East Timorese public and even its leadership...who question the fairness of a process that leads to the prosecution of relatively low ranking Timorese in Dili.”

<sup>129</sup> Amnesty International, “East Timor: Justice at Risk,” Amnesty International has documented cases “in which little or no action has been taken against suspected criminals who are members of unofficial security groups with links to political parties, former members of the armed group Falintil, political leaders or church officials.”

community does not yet have the capacity to operate on its own, the UNTAET and the Special Panels have begun the normative transfer necessary for the rule of law to be operationalized. The Special Panels could play a key role in the post-conflict reconstruction and the institutionalization of the rule of law in East Timor. However, the Special Panels are still too international and are not living up to their full potential because they lack the funding, expertise, and resources to be an effective venue for post-conflict justice.

The Special Panels have been effective at building legal capacity in East Timor, but remain heavily dependant on international support. This condition is probably inevitable in a situation where infrastructure, experience, capacity and resources are low to non-existent. As East Timorese gain experience in the legal sector, the international community must retain a presence that will ensure that the East Timorese courts are not corrupted by political concerns before they have the opportunity to internalize international legal norms and practices.

The Special Panels for East Timor have provided the international community with a model for post-conflict justice. However, the international community has not put its full resources into making the model work correctly. In addition to resources shortfalls, practical difficulties such as the lack of indigenous legal personnel and the adoption of new legal codes have hampered efforts to prosecute international crimes in a timely and efficient manner. Compounding the funding, resource and experience problems is that the political will to make the Special Panels live up to their potential is lacking at several levels.

Post-conflict justice and reconciliation is taking place in East Timor. That it exists at all is impressive. Yet, it will only work if several conditions are met. First, the East Timorese jurists need sustained experience with and appreciation for the rule of law. This means that resources, funding and international expertise will have to be expended there for an extended period. Second, political will has to exist that will encourage Indonesia to comply with its obligations to hold its people accountable. Finally, the East Timorese government needs to recognize that if it does not pursue the post-conflict justice and reconciliation process, its citizens will grow impatient with the rule of law and will begin

to use extrajudicial means to settle cases against those who commit international crimes. Recent events in Indonesia indicate that the atmosphere of impunity is not going to change in the near future. Therefore, the United Nations will have to sustain its assistance until the local prosecutions are completed and a certain level of capacity is reached that will perpetuate the rule of law.

#### **D. SIERRA LEONE**

The Special Court in Sierra Leone almost did not happen. The Lomé Peace Accords of July 1999, set aside plans for a court to try violations of international criminal law in favor of an amnesty program that promised to stop the fighting and bring Revolutionary United Front (RUF) rebels into the government. By October, the head of the RUF, Corporal Foday Sankoh moved to Freetown and took his place in the cabinet.<sup>130</sup>

Unfortunately, the peace achieved at Lomé did not hold, structural weakness in the agreement led to more fighting. In May of 2000, the new UN Force – UNAMSIL, established by the Security Council pursuant to the Lomé Accords for security during the peace process, was seriously threatened by RUF attacks. With the credibility of UN Peacekeeping on the line, the United Nations made a plea for international support. Only a timely response by the United Kingdom<sup>131</sup> salvaged UNAMSIL and the peace process in Sierra Leone.

The RUF incursion was a watershed event for the justice and reconciliation process in Sierra Leone. GOSL with the support of the United Nations, the United States, the United Kingdom and the regional actors in West Africa from the Economic Community of West African States (ECOWAS), reversed positions that they had taken at Lomé less than a year earlier. Instead of trading peace for justice and settling for the TRC

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<sup>130</sup> Sam Gejdenson, Sierra Leone: Giving Peace a Chance,” Democratic Office, House International Relations Committee, undated, <[http://www.house.gov/international\\_relations/democrats/briefs/fpbSierraL.htm](http://www.house.gov/international_relations/democrats/briefs/fpbSierraL.htm)>, (December 9, 2002).

<sup>131</sup> The UK had a long history of political and commercial ties in Sierra Leone as the colonial ruler. During the civil war in the 1990s, the UK led an International Contact Group that worked for reconstruction of Sierra Leone infrastructure. The intervention in 2000 was the second in two years. The UK had also initiated a program to develop the SL Army that still exists today. The UK’s Department for International Development is the lead international donor outside the UN working on development projects in Sierra Leone. Adekeye Adebajo, *Building Peace in West Africa*, Int’l Peace Academy, New York, 2002, pp 93-95. Also personal interviews with British officials in Sierra Leone, summer 2002.

as the sole mechanism for accountability, GOSL and the international community called for the worst offenders of the civil war to be brought to justice.

At that time, the Government of Sierra Leone (GOSL), requested international assistance in setting up a war crimes tribunal for the civil war that had devastated the country since 1991. However, the GOSL did not want to relinquish sovereignty to an international tribunal sitting in a foreign capital. It insisted that the trials be conducted in Sierra Leone, and Sierra Leoneans participate in the prosecutions.

The Special Court, unlike its counterparts for Rwanda and Yugoslavia, is a hybrid institution created by agreement between the United Nations and the national government, and implemented through both a Security Council Resolution and domestic legislation. Its stated mission is to bring to justice to those who bear the greatest responsibility for violations of international humanitarian law.<sup>132</sup> This arrangement stemmed from the fact that “there was no political support for setting up another, very expensive, international criminal tribunal, and the Court could be established only with the full support and cooperation of Sierra Leone, which, in any event, wanted a mixed tribunal.”<sup>133</sup>

Advantages of the Special Court include: an independent Special Prosecutor who has the backing of the international community; a limited three-year mandate that involves the GOSL<sup>134</sup> and legal community of Sierra Leone as stakeholders; legitimacy and legality under Sierra Leone law; an outreach program that ensures Sierra Leoneans know why the Special Court has been set up and how it will work; and focused prosecutions against those most responsible, while delivering visible justice for the people of Sierra Leone.

The Special Court handed down its first indictments in March 2003.<sup>135</sup> The indictees included individuals from all sides of the conflict. Trials for the indictees in

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<sup>132</sup> Mark Bellamy, Acting Assistant Secretary of State for African Affairs, Testimony, House International Relations Committee, Subcommittee on Africa, Washington, D.C., May 16, 2002.

<sup>133</sup> Avril MacDonald, “Sierra Leone’s Shoestring Court”, *International Review of the Red Cross*, March 2002, Vol. 84 No. 845, p. 124

<sup>134</sup> The lack of involvement by the Rwandan and Bosnian governments has been a criticism of the ICTY and ICTR.

<sup>135</sup> Email to author from Tom Perriello, Political Advisor, Office of the Prosecutor, Special Court for Sierra Leone, dated June 11, 2003. See also SLSC – 2003- 01-I, 7 March 2003, The Special Court for Sierra Leone, “The Prosecutor against Charles Ghankay Taylor.”.



custody and those who will be brought in later should begin later in 2003. However, even before the accused stand trial, the Special Court is starting to show itself as an independent actor in the post-conflict reconstruction process in Sierra Leone. The success of the Special Court will be evaluated through its ability to infuse international legal norms to the judicial system in Sierra Leone, the resulting capacity developed by these institutions, the adherence to international criminal law by the courts and the impact that the Special Court has on international criminal law.

## **1. Analysis of Effectiveness**

### ***a. Capacity Building***

Historically Sierra Leone had a relatively strong legal capacity. During the civil war judicial capacity was lost outside of the capital Freetown and a few large provincial towns, but the judiciary retained some independent capacity.<sup>136</sup> The Special Court has started to rebuild the capacity of the Sierra Leonean criminal justice system from this diminished base. Several of the judges on the Special Court are Sierra Leonean and the Registry and Prosecutors offices each have Sierra Leonean staff including deputy prosecutors.<sup>137</sup> Finally, the Special Court has been working to “create a defense support section that will include both Sierra Leonean and international lawyers.”<sup>138</sup> This section will ensure that indigenous defense attorneys are capable of defending indicted perpetrators who might not be able to afford high priced legal counsel from Europe or America.

Despite this progress, Sierra Leone still has capacity issues. In Freetown, trials of RUF personnel and other combatants from the post 1999 part of the conflict have been hampered by resource shortfalls and lack of defense counsel.<sup>139</sup> Resources shortfalls and capacity problems also hinder justice in the hinterlands. Yet overall, increased adherence to international criminal law norms by the national courts is promising. The system will also be strengthened by the parallel development of the security services and the overall international effort aimed at social and economic development.

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<sup>136</sup> Human Rights Watch, “Justice for Iraq.”

<sup>137</sup> International Crisis Group, *Sierra Leone After Elections: Politics as Usual?* Africa Report Number 49, Freetown/Brussels, July 12, 2002, p. 19.

<sup>138</sup> “Seventeenth Report of the Secretary-General on the United Nations Mission in Sierra Leone,” UN Doc. S/2003/321, 17 March 2003, pp. 10.

<sup>139</sup> *Ibid.*, pp. 8- 9.

Good relations between the UN, donors, and the GOSL have facilitated capacity building. Preexisting cooperation between the United Nations and international donors in the economic, social and security realms have bolstered the Special Court's capacity building in the judicial sector. British and American aid agencies have each assisted specific areas in the judicial sector and, the British have taken the lead in training the Sierra Leonean security forces and police. The British have set up the International Military Advisory and Training Team (IMATT) that has succeeded in restructuring the Republic of Sierra Leone Armed Forces (RSLAF). Additionally, the British through the Commonwealth Safety and Security Project have worked with UNAMSIL and local police to build investigative capacity.<sup>140</sup> These initiatives will take several more years to institutionalize and will require continued stability in Sierra Leone and the region to take hold.<sup>141</sup>

The Special Court, as part of the overall international effort, has been able to transfer international norms to Sierra Leone in several ways. First, the Special Court has adopted an active outreach program that has built on the efforts of international NGOs and civil society to help understand what the court is attempting to do. Second, the Special Court has made an effort to work with the TRC in order to make sure that the two institutions complement each other and do not clash over post-conflict justice issues.<sup>142</sup>

***b. Development of International Criminal Law***

The Special Court has developed international criminal law in two key ways. First, it has built on ICTR rules and procedures while committing itself to avoiding the slow pace, expense and bureaucracy of the court in Arusha. The Special Court is taking a further step by using Sierra Leone lawyers and judges in the adaptation of the

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<sup>140</sup> Ibid., pp. 4-6.

<sup>141</sup> Current fighting in Liberia and the Ivory Coast has the potential to spill over the border of Sierra Leone especially since diamond-mining areas, which can provide revenue for arms, are close to the border.

<sup>142</sup> Mail and Guardian, "Sierra Leone: Searching for Justice," Africa News, October 11, 2002, <<http://web.lexis-nexis.com>>, (November 2, 2002). Also a conversation between the author and Tom Perriello, political advisor for the Special Prosecutor, August 2002, Freetown, Sierra Leone. Cooperation with the TRC is in the Special Court's interest because due to the Lomé amnesties, most of the international crimes committed before July 1999 will not be addressed by a court. Currently, the Special Court maintains that it has the authority under Sierra Leonean law to use testimony given at the TRC for investigatory purposes. However, the Prosecutor's office has indicated a preference to develop its own evidence and that such a move would be a last resort.

ICTR rules of procedure and evidence.<sup>143</sup> Recently, the Special Court made another important contribution to international law by being the first post-conflict justice institution to indict individuals, including a sitting head of state, for the use of child soldiers as a violation of international humanitarian law.<sup>144</sup>

*c. Support for Special Court*

Perhaps the greatest advantage that the Special Court enjoys is a high level of international and national support. Major powers and international NGOs have been instrumental in lobbying for and facilitating the groundwork for the Special Court. Moreover, the presence of the 17,000 UN forces and the willingness of states like Britain<sup>145</sup> to use force to enforce the UN mandate have guaranteed that the Special Court has been set up for success.

Notwithstanding the international support that created it, the Special Court has been effective in maintaining both international and national support for its mission. This support has been due to the institution's ability to legitimize itself to the Sierra Leonean public, civil society, armed forces and ex-combatants. For example, the Prosecutor has taken opportunities to travel throughout Sierra Leone to view crime scenes, meet with victims and engage civil society. In February 2003, he addressed senior military officers, NGOs and other GOSL officials, some of whom were concerned that they or their associates might be indicted, in order to explain his views and expectations. The Court has been proactive in maintaining that it will bring all of those persons most responsible for international crimes to justice no matter what group they belonged to during the war. The Special Prosecutor reinforced this point dramatically in March 2003 when he indicted a sitting head of state (of another country), a former cabinet minister,

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<sup>143</sup> No Peace Without Justice, "Sierra Leone Mission: Narrative Status Report 2002," April 9, 2003, <<http://www.npwj.org/modules.php?name=News&file=article&sid=1069>>, (May 22, 2003).

<sup>144</sup> Email to author from Tom Perriello, Political Advisor, Office of the Prosecutor, Special Court for Sierra Leone, dated June 11, 2003. See also SLSC – 2003- 01-I, 7 March 2003, The Special Court for Sierra Leone, "The Prosecutor against Charles Ghankay Taylor."

<sup>145</sup> In addition to the intervention in 2000, according to Major George Cadwalader, USMC and Captain Felipe Paez, USMC who were in Freetown on a training mission during the time period in question, an elite unit of British Gurkhas was deployed to Sierra Leone coinciding with the arrest of the seven indictees in February-March 2003. Phone conversations, March 2003.

Hinga Norman, the former leader of a pro-government militia who has close ties with the current GOSL, and a sitting member of Parliament.<sup>146</sup>

The Special Court's outreach program includes all the organs of the Court. The Special Prosecutor, the Registrar, the Judges and all their subordinates have visited with government officials, the UN, international donors, civil society, international NGOs and the Sierra Leonean people to explain the court and its relation to them, and to the TRC.<sup>147</sup>

The GOSL is controlled by the Sierra Leone Peoples Party (SLPP), which won an overwhelming victory in the May 2002 elections. The party is led by President Ahmed Tejan Kabbah who was elected with over 70 percent of the vote leaving Sierra Leone close to one party rule.<sup>148</sup> The political situation in Sierra Leone is extremely complex and although the legislation enacting both the TRC and the Special Court maintain that they are independent bodies, the GOSL will still have informal means of influencing the operations of both bodies. Initially enthusiastic for the Special Court after the May 2000 incursion by the RUF, the SLPP dominated GOSL now has more power and confidence and has been dragging its feet on ensuring that the Special Court and the TRC are set in motion.<sup>149</sup>

The Special Court enjoys a high level of international support, but a potential obstacle to the sustained success of the TRC and Special Court is a failure of international resolve to sustain the broader post-conflict reconstruction process. However, the UN Secretary General has indicated that he will continue to encourage the Council to update the UNAMSIL mandate for six-month increments as the UN and its partners implement the post-conflict scheme. His concerns go beyond Sierra Leone to the containment of other conflicts in the West African region.<sup>150</sup>

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<sup>146</sup> "Seventeenth Report of the Secretary-General," p. 2.

<sup>147</sup> It is the relationship to the TRC and its impact on the Lomé amnesties that has raised the most questions and concerns from Sierra Leoneans. By using an active outreach program these institutions can inform the population about how international norms are developing by using complementary institutions that will identify wrongful conduct and establish a truthful record.

<sup>148</sup> International Crisis Group, July 2002, p. 18.

<sup>149</sup> Interview with Tamir Waser, political and economic officer, US Embassy, Freetown from 8/01 to 8/02 on 11 December 2002..

<sup>150</sup> "Seventeenth Report of the Secretary-General."

## **2. Conclusion**

The Special Court has been effective at building indigenous legal capacity, transferring international legal norms and contributing to the growing body of international criminal law, so far. Time will tell if it can accomplish its mission within its three-year mandate. Its long-term effectiveness will be judged not only on its ability to meet its specific mission, but also on its ability to ensure that the post-conflict justice and reconciliation process is coordinated with the overall reconstruction process. Cooperation between the international and national levels including NGOs and security forces to date is encouraging. Unlike East Timor and Rwanda, the parties have consensus and synergy. However, gaps in cooperation may open up once proceedings start and real interests are revealed.

The Special Court can work if the GOSL and the international community want it to work. So far, they have worked together, along with civil society and international NGOs, to set up the necessary institutions to ensure that lessons from other post-conflict justice efforts have been learned and mistakes are not repeated.

Recent indictments handed out by the Prosecutor gave the actors, the Sierra Leonean people and the regional powers the ability to see how the Special Court was being received. The significance of the relative calm is heightened by the fact that fighting in Liberia and the Ivory Coast did not test the nerve of the Court, or the GOSL in carrying out their mandate. The Special Court presents the GOSL and the international community with an opportunity to demonstrate how justice and reconciliation can bolster the post-conflict reconstruction process and help secure the policy objectives of peace on a national and regional scale. National and regional peace will in turn help support institutions building that will facilitate democratization, the protection of human rights and the development of free market economics.

## **E. CONCLUSIONS**

The approaches described in this chapter have been successful in building capacity and developing international criminal law. The institutions operating in Rwanda have worked, but not as effectively as they could have if there was an integrated approach. It has had some success in developing international law but the fragmented approach could have ensured better long-term capacity building and deepening of

international norms. Conversely, the integrated approaches, used in East Timor and Sierra Leone, have been able to build effective institutions that will have a legacy of indigenous capacity.

A lesson for future ICTs and the ICC is that the boundaries and rules of cooperation between the international and national levels need to be developed beforehand. Identifying those who will be prosecuted and where the trials will take place can reduce confusion and friction. Trial location, partnership programs, parity of sentences and many other issues need to be resolved up front. In cases such as East Timor, where the courts are hampered by an absolute dearth of funding, resources and personnel, the international community must dedicate the appropriate resources to ensure effectiveness. For hybrid such as the Special Court in Sierra Leone to be effective, the state and international community must have the political will to give the prosecutors and judges the support they need to make the difficult and possibly unpopular decisions. The recent failure of Ghana to arrest President Charles Taylor of Liberia, who was in Ghana when the Special Court unsealed his indictment, shows that political will is lacking in some quarters, especially in states that have been fortunate enough to escape conflict.<sup>151</sup> Yet the reaction in Sierra Leone itself has been that of overwhelming support, demonstrating that the Sierra Leoneans are willing to pursue the process.

A key lesson from the case studies explored in this chapter is that for post-conflict justice to be effective, the international community has to recognize that national initiatives that will operate alongside or concurrent to the main prosecutions for international crimes. The international community needs to recognize that the state level institutions that operate will be in existence long after the international legal experts have come and gone. By working to transfer international norms, build residual legal capacity and ensure that the domestic legal institutions operate according to international legal

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<sup>151</sup> U.S. policy is that it supports the Special Court and feels that Taylor should face justice in Freetown. However, the State Department was unclear on what lengths the United States would go to in order to ensure Taylor's presence before the Tribunal. Richard Boucher, Department of State, "Daily Press Briefing," Washington, D.C., June 6, 2003, <<http://www.state.gov/r/pa/prs/dpb/2003/21312.htm>>, (June 13, 2003)

standards, the international community will leave a legal system that is effectively integrated into the overall post-conflict reconstruction process and better set to work under the rule of law.

If set up properly, post-conflict institutions can help infuse long term stability and commitment to the rule of law if certain conditions are met. First, the post-conflict state must have a commitment to uphold the legal norms exercised by the post-conflict institution. Second, the international community must continue its support and recognize that post-conflict states need to strike a balance between the pursuit of international justice and other priorities such as reconciliation and alternative judicial and conflict resolution mechanisms that will allow perpetrators and victims to put the past behind them and begin the process of state building. Third, the international community and the post-conflict judicial institution must make post-conflict justice part of the overall post-conflict reconstruction effort. Thus, judicial mechanisms need to be integrated into and synchronized with the other spheres of post conflict rebuilding. Finally, these post-conflict judicial institutions must develop a close connection with the people of the post-conflict state. Location of the Court in the state is important, but it is also vital to have an active and engaged outreach program that will inform perpetrators, victims, witnesses, civil society and common citizens about the workings of the Court, especially its commitment to punish individuals for their heinous crimes, regardless of their race, ethnicity, region, political beliefs, or position of power.

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## **IV. CONCLUSION**

### **A. EVALUATING POST-CONFLICT JUSTICE INSTITUTIONS**

The preceding chapters have demonstrated that post-conflict justice institutions do impact on liberal and realist interests. Liberal interests seek the extension of international criminal law that will ensure accountability and promote the rule of law. Realist interests, on the other hand, seek to preserve sovereignty and promote stability in the international order. These interests are not always balanced in the approaches discussed above. In some cases, the pursuit of liberal ideals has been at the expense of sovereignty and long-term stability. Consequently, these initiatives have had limited support from powerful international actors and post-conflict states. In other cases, international and post-conflict actors have seen the utility of using these liberal approaches to further their own realist goals of promoting stability. This section will examine these approaches and provide a matrix that illustrates the relative advantages and disadvantages of each.

#### **1. Unilateral Approaches**

##### ***a. Advantages***

The principle advantage of the unilateral approaches described in chapter two is that they have driven the development and the extension of international criminal law over the past decade. The work of the ICTY and courts operating using universal jurisdiction have broken down barriers to the reach of international criminal law and have demonstrated that post-conflict justice does not have to mean “victor’s justice.” These advances, coupled with the fact that enforced cooperation with international tribunals could be used as a tool to compel reform in post-conflict states, make these institutions useful to the international community.

##### ***b. Disadvantages***

The disadvantages of unilateral approaches flow from a primary focus on the international level that borders on the exclusion of local interest. First, these institutions have done little to nothing in terms of building the capacity of the legal systems in post-conflict states. In the cases examined, the venue of the tribunal is removed from the scene of the criminal activity and outreach programs, if they exist, are poorly designed and implemented. This lack of capacity building makes it hard for

international legal norms such as due process, judicial independence and fair trials to be accepted and applied. Instead, the post-conflict states have developed legal capacity for political reasons, to preempt international efforts or in response to pressure from Western conditionality. While some capacity building may be better than none at all, the aim of these programs is to satisfy short-term political objectives such as preemption of international tribunals or inclusion in international organizations. Thus, these changes may be cosmetic and not stimulate normative change.

The same argument can be used against complementarity under the ICC. The goal of complementarity is to promote capacity building and normative growth through the threat of external intervention in the state legal process. Yet, while complementarity may force states to adopt superficial structures that satisfy the ICC, there is no accompanying program that will ensure that the international standards and concepts are ingrained in the personnel who will be operating the system.

The second disadvantage flows from the first, namely that the lack of attention and focus on what is actually taking place in the post-conflict state has hampered the ability of these institutions to be part of a long-term solution. Consequently, support for these approaches in post-conflict states is low. The lack of support for the ICTs in Yugoslavia (and Rwanda) underscore the problems that these institutions face due to remoteness of the venue, lack of meaningful outreach and a focus on vindicating international crimes against certain individuals, without addressing the problems and issues that arise when other, lower level perpetrators must be held accountable.

Table 1. Post-Conflict Tribunal Typology

	Effectiveness		Support	
	Capacity Building	I-Law Development	International	Post-Conflict State
ICTY	Low	High	High	Low
ICC	Low	High	Medium	Unknown
ICTR	Low	High	Medium	Low
Special Panels	High	Medium	Medium	Medium
Special Court	High	High	High	High

International support for the mission of these institutions, and for universal jurisdiction, is far from guaranteed. The fact that international legalists have pushed the ICTY and the ICC and international criminal law into the realm of international relations has caused some states to take pause. Although some advocates and states may see legalist autonomy as an advantage, powerful states, such as the United States, see a threat to their right to conduct international relations and work with warring parties to establish peace. The immediate consequence is that these ICTY found itself marginalized when it did not serve the interests of the United States and Western Europe. Moreover, the controversy between the United States and other powers over the ICC will ensure that the Court will never have the enforcement power of the Security Council. In short, unilateral approaches can contribute to the common good of the international community (but not the post-conflict state), but only when they have the backing of at least some of the major powers.

## **2. Multilevel Approaches**

### ***a. Advantages***

In contrast to the unilateral approaches, the multilevel approaches bring several advantages to post-conflict justice at the same time. They have a demonstrable ability to build or rebuild legal capacity in post-conflict states, while making important contributions to the development and extension of international criminal law. In the process, they have generated a large amount of support, both internationally and within the post-conflict states.

In each of the multilevel approaches studied, legal capacity in the post-conflict state has been developed in response to the need to rebuild society and to hold individuals accountable for international crimes. In Rwanda, the ICTR behaved similarly to its sister institution in The Hague, but the national courts, with international assistance and augmented by gacaca were able to institute and build upon a legal system that has continuously worked to put international legal norms into effect. In East Timor and Sierra Leone, the post-conflict institutions are directly responsible for working with the post-conflict state and the international donor community to integrate the judicial system into the overall post-conflict reconstruction process. These efforts have brought trial venues to the post-conflict state; ensured outreach programs were operating; and have worked closely with indigenous legal personnel to ensure that the norms and values underlying international justice are accepted.

These institutional approaches have also made important contributions to the body of international criminal law. They have extended the reach of international law by making convictions for crimes such as genocide and the use of child soldiers, and they have also been instrumental in the development of international procedural law.

With the exception of the ICTR (which has acted more like a unilateral institution), institutions in Rwanda, East Timor and Sierra Leone have enjoyed positive international and national support. This support is largely due to the fact that the United Nations and major donors have had a voice in the development of the courts and can use political, and economic means to withhold support. The support that these institutions have garnered in post-conflict states has been due to proactive measures designed to

reach and educate citizens about the post-conflict legal process and capacity building programs that help build legitimacy.

***b. Disadvantages***

The main disadvantage of multilevel approaches is the potential for politicization. The interests of the institution and the post-conflict government will sometimes diverge, and post conflict justice may suffer as a result. In East Timor, for example, the new government has been reluctant to vigorously pursue international criminals in Indonesia due to long-term economic and security concerns. Similarly, the reticence of the Rwandan government to pursue RPF members accused of international crimes may undermine advances made by the ICTR and national courts. This problem is not limited to multilevel approaches -- the ICTY has had similar difficulties arresting powerful war criminals -- but it is more apparent with them due to the close working relationships that develop with the post-conflict states. Post-conflict institutions that work closely with the post-conflict state are inherently more vulnerable to being perceived as party to political struggles. However, this may be an unavoidable risk if local capacity is to be (re)built, and post-conflict justice to endure.

**3. Conclusion**

Table 1 presents a summary of the effectiveness of the post-conflict justice institutions studied here. The table demonstrates graphically that multilevel approaches are consistently much more effective in building local capacity and maintaining international and domestic support, while still contributing moderately to the development of international law. Unilateral institutions have been more effective in expanding the reach of international law, but they have done so without engaging the major powers or post-conflict states, and without providing a foundation for sustainable justice. Ironically, by making themselves more relevant to the interests of states multilevel approaches also make themselves more useful to the liberal cause of global justice.

**B. POLICY AND CONCLUSION**

**1. Policy Issues**

Decision makers who are faced with assisting in post-conflict reconstruction efforts need to consider a vast array of policy issues ranging from governance programs

to economic relief to the possible deployment of military forces. Increasingly, these policymakers have been urged to ensure that post-conflict justice measures to punish individuals for international crimes are taken. While these concerns appear to reflect legalist liberal values of accountability and the rule of law, they also have some practical aspects that may limit intrusions on sovereignty and provide for long-term security and stability in the conflict zone.

These policy considerations can be broken down as follows: the importance of post conflict justice institutions in the post-conflict process; important considerations for institutional design; the costs (and savings) of post-conflict justice institutions; and the factors that can threaten the success of these institutions. These policy considerations assume that future post-conflict justice institutions will be more integrated into the post-conflict reconstruction effort and will incorporate local capacity building programs. These assumptions are based on the fact that the ICTY has recently started to develop local capacity building projects, perhaps in response to the recognized successes of tribunals in East Timor and Sierra Leone.

*a. Importance of Post-Conflict Justice Institutions*

There are several compelling reasons why post-conflict justice institutions are important to decision makers. The first reason is purely liberal and holds that these institutions can do away with impunity and punish those individuals most responsible for international crimes. By punishing those most responsible as individuals, the international community absolves groups of 'collective guilt,' and potentially halts the cycle of violence. There are two main realist reasons for the importance of post-conflict justice institutions. First, post-conflict justice institutions, by punishing those who deviate from international legal norms, help to stabilize the international order and make the world more secure. Second, the consistent and effective use of internationally sponsored tribunals will add certainty to the international order since warlords, dictators and other potential international criminals will be put on notice that they will be held accountable for their actions. These individuals will understand that even an indictment by an international court will make them into pariahs and marginalize them in front of their people and the international community. Second, post-conflict justice is cost-effective. A credible threat of prosecution at the Lomé conference in 1999 may have brought the RUF

under control sooner and would have marginalized Liberian president Charles Taylor. Instead, the United Nations was forced to spend billions more on peace operations, the international community has embarked on a multi-year rebuilding effort and fighting continues in Liberia, further destabilizing the entire subregion. Two recent events indicate that the major powers are starting to recognize this lesson. First, Charles Taylor's long awaited indictment may be the key to resolving conflict in West Africa. Then, during a visit to the eastern part of the Democratic Republic of the Congo, members of the Security Council stated that there would be no impunity for the atrocious crimes committed there.<sup>152</sup>

***b. Considerations in Post-Conflict Justice Institutional Design***

When decision makers do agree to form an internationally sponsored tribunal, they must design it to validate liberal norms and serve as a tool to ensure stability. First of all, the tribunal must be sponsored by the international community at large in order to avoid a stigma of victors justice or that the court is working at the behest of a hegemon. Since the assumption has been made that working with the post-conflict state is the preferable course of action, the international community must then assess the willingness of the state to allow the international community to take charge of the prosecutions. If cooperation is not anticipated or forthcoming, a more aggressive international court that has the backing of the international community willing to force compliance may be needed. Once willingness is confirmed, a base level of capacity needs to be established. In East Timor, the legal system was essentially non-existent, but Sierra Leone and the former Yugoslavia each had some capacity to build on.

If the base capacity is known, then training and development programs can be designed and sectors such as the police, prisons or defense attorney training can be targeted for development. Of course, this process has to be integrated within the entire post-conflict rebuilding process where efforts aimed at governance, economic development and security all have elements that will overlap and coincide with the reform of the criminal justice sector. These capacity building initiatives have to be

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<sup>152</sup> "DR Congo 'War Criminals Warned,'" BBC News, UK Edition, June 13, 2003, <<http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/2987176.stm>>, (June 14, 2003)

matched with community outreach projects that will keep the public informed and solicit their participation.

In many cases, the number of potential perpetrators of international crimes and lesser offenses may outweigh the combined capacity of the international tribunal and partner courts. Examples include Rwanda, East Timor and Sierra Leone. In these cases fora such as gacaca and TRCs that can give conditional amnesties for non-international crimes are useful alternatives and have the added bonus of serving as venues for reconciliation and forgiveness.

Importantly, these institutions need to focus on instilling and maintaining international standards, but must be able to have the flexibility to take local needs and concerns into consideration. Balances must be struck between the single-minded pursuit of international justice and the long-term healing of the post-conflict environment. Moreover, while the institution must operate on a time-line that prevents it from becoming an inefficient international bureaucracy, it must be designed to see the post-conflict justice process through and ensure that international legal norms have taken hold.

*c. Costs (and Savings) of Post-Conflict Justice*

As mentioned above, international post-conflict tribunals can be cost effective. Although they can run into the hundreds of millions of dollars and take a disproportionate amount of time to conduct their proceedings, the costs are typically less than the deployment of thousands of troops and the relief efforts needed to stop a major conflict. If properly supported in terms of political will and the credible threat of military power, they can also deter would be criminals from continuing or initiating conflicts. In the long-term a properly conducted post-conflict justice process will save the post-conflict state and the international community time, money and resources if the effort results in the transfusion of the rule of law and other legal norms that support democratic governance.

*d. Threats to the Post-Conflict Justice Process*

The final policy consideration is ensuring adequate commitment so the post-conflict justice and rebuilding processes do not fail. These failures can come about in several ways. First, the international community may lose interest in the process, especially if it does not produce immediate results. The ICTR is a good example, left to



its own devices in Arusha; the ICTR became marked by waste, inefficiency and lack of effort. Due partly to these shortcomings, the international community has not used the ICTR as an effective tool to change policy in Central African states. Similarly, it was not until western policy makers realized that the ICTY could be useful that they started to condition aid and assistance on cooperation with the Court.

Post-conflict justice processes can also fail when the interests of the international and national components diverge. This may be an inevitable consequence of local politics. Examples can be seen in almost every case study presented above. Post-conflict states need to balance obligations to international tribunals with the demands of their constituencies. In some cases, such as the former Yugoslavia, nationalist and ethnic politics play a large factor in non-cooperation with the Court. In other cases, such as east Timor and Indonesia, powerful local interests use their influence to avoid accountability. These types of threats to the post-conflict justice process can be anticipated and if not solved, then at least managed through aggressive outreach programs that educate the citizens of the post-conflict state and an overall program that synchronized with the larger post-conflict reconstruction process. If nothing else, the prosecutors, judges and administrators of the international tribunal need to pay attention to local politics while pursuing international the vindication and instillation of international legal norms.

## **2. Conclusion**

International criminal law will continue to evolve as the various post-conflict justice institutions carry out their mandates and new institutions are developed. Even at this writing a post-conflict tribunal is being contemplated for Iraq and the details are being negotiated for a Special Court in Cambodia. The ICC, a dream of liberal institutionalists for the past sixty years has been created, but its incompatibility with realist interests on the Security Council means that will not be an effective post-conflict judicial mechanism. Thus, the international community will most likely utilize variants of the ICTs and mixed tribunals to address international crimes.

Despite the marginalization of the ICC it is still in the interests (liberal and realist) of the international community and the major powers, in particular, to pursue post-conflict justice. Not only will this pursuit fulfill liberal goals of addressing heinous international crimes, but it will also fulfill realist goals of containing threats and building

stability, security, and order in an anarchic world. Moreover, costs would be reduced if international tribunals could pose a threat to warlords and dictators and their subordinates who commit these offenses. The tragedy of the ICC is that it could serve both liberal and realist interests, albeit imperfectly, if it was a tool of the United Nations Security Council and had a program designed to deploy into post-conflict states in order to promote accountability while building capacity.

Notwithstanding the controversy over the ICC the spirit of 1945 is alive and well and the Nuremberg legacy is being fulfilled. Over the past ten years, dozens of international criminals including heads of state, government officials, warlords, and many others have been either convicted or indicted for their offenses. The international community is addressing impunity, which reigned in many countries for most of human history. However, states tend to put their interests before their ideals and are only willing to pursue these criminals when it serves their purposes. In an age of failed states, terrorism and extremism, the recognition and enforcement of an international rule of law is in the interest of all.

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